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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 388

O/Y WIPU, as owner of the Finnish steamer WILJA,

Petitioner,

against

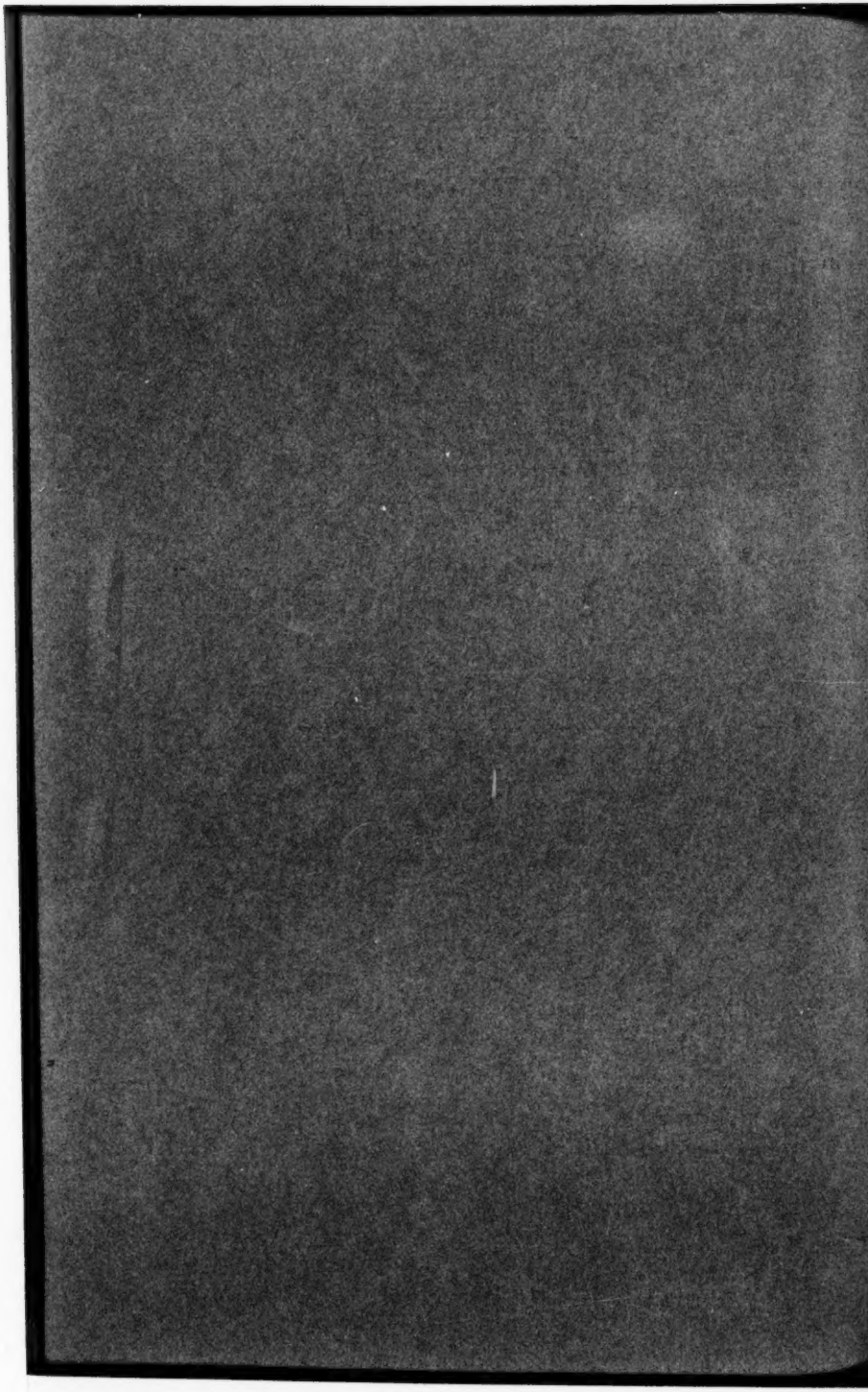
LOUIS LOUIS DREYFUS, JEAN LOUIS DREYFUS, PIERRE LOUIS DREYFUS and FRANCOIS LOUIS DREYFUS, co-partners, doing business under the firm name and style of LOUIS DREYFUS & Co.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

EDGAR B. KRAUSHAR,
Counsel for Petitioner.

HERBERT M. STAFF,
JAMES MCKOWN, JR.,
of Counsel.



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Supreme Court of the United States

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No. .....

O/Y WIPU, as owner of the Finnish steamer WILJA,
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LOUIS LOUIS DREYFUS, JEAN LOUIS DREYFUS, PIERRE LOUIS DREYFUS and FRANCOIS LOUIS DREYFUS, co-partners, doing business under the firm name and style of LOUIS DREYFUS & CO.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, O/Y Wipu, a corporation, respectfully shows:

Summary Statement of the Matters Involved.

I. Your petitioner is a Finnish corporation which, at all material times, was the owner of the Finnish steamer *Wilja*. It has offices for the transaction of business in Finland (R. p. 20), but not in the United States (R. p. 33).

II. The respondents are citizens and residents of France and are co-partners, doing business under the firm name and style of Louis Dreyfus & Co., with their head office at Paris, France, and with branch offices located generally throughout the world. They have a branch office in the Southern, but not in the Eastern, District of New York (R. p. 20).

III. On August 18, 1939, petitioner and respondents entered into a charter-party (reproduced R. p. 28) of the petitioner's steamship *Wilja* for the carriage of grain from St. Lawrence River loading points in the Dominion of Canada to various points in the British Isles and/or the continental ports of Antwerp or Rotterdam. The charter-party was signed and dated at London, England; the petitioner acted through a citizen and resident of Finland, one Antti Wihuri, managing owner of the vessel, who, in turn, was represented by the London chartering firm of H. Clarkson & Co., Ltd. The respondents acted through their London branch office. The charter-party provided for freight to be paid in British sterling in England, and also contained the following clause:

> "16. Canadian Water Carriage of Goods Act, 1936 * * * and Arbitration Clause No. 39 of the Centrocon C/Party to apply to this charter-party."

Arbitration clause No. 39 of Centrocon charter-party, incorporated by the above reference, reads (R. p. 33):

> "All disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single arbitrator, be referred to final arbitrament of two arbitrators carrying on business in London, who shall be members of the Baltime and engaged in the shipping and/or grain trades * * *"

IV. On November 18, 1939, an addendum to the said charter-party (printed R. p. 29) was agreed upon between the London representatives of owner and charterer. The addendum, like the charter-party, was dated and signed at London. In brief, the addendum (a) provided for freight at

approximately twice the rate provided in the original charter-party (and at approximately one-half the then current market rate); (b) limited the ports of discharge to Antwerp and/or Rotterdam; and (c) designated lay days and canceling dates as November 20, 1939, and November 28, 1939, respectively. The addendum further specifically provided: "All other conditions and exceptions of charter-party remaining unaltered."

V. On Saturday, November 18, 1939, respondents' New York office instructed the master of the *Wilja* to proceed from New York (where she then was) to Montreal and there load a full cargo of soya beans (R. p. 39).

VI. On Monday, November 20, 1939, in accordance with charterer's directions, the *Wilja* sailed from New York for Montreal (R. p. 20). After departing from New York, however, she sustained serious damage to her machinery, which necessitated her return to New York on the following day for repairs.

VII. The repairs required to be made consisted of renewal of the high-pressure cylinder cover and of the combination air and circulating pump, which could not be completed before December 27, 1939 (R. p. 103).

VIII. In the meantime and prior to December 15, 1939, the Port of Montreal closed for the winter, thereby making performance of the charter-party impossible before the following spring (R. p. 66). Thereupon the respondents endeavored to compel the petitioner to make an entirely different trip from that which had been contracted for, and upon the petitioner declining to modify the charter-party further, and notifying the respondents that it considered the charter-party frustrated (R. pp. 65-66), the respondents instituted the instant cause by filing their libel *in personam* in the United States District Court for the Eastern District of New York and causing the *Wilja* to be seized under writ of foreign attachment (R. p. 1).

IX. The libel (as amended) sounds in contract (R. p. 20) and seeks damages in the amount of $52,000 for the alleged wrongful neglect and refusal of petitioner to carry respondents' cargo and for alleged violation by petitioner of its alleged warranty that the *Wilja* was tight, staunch and strong and in every way fitted for the voyage agreed upon (R. p. 24).

X. Since the cause was clearly one in which the District Court had jurisdiction (a) of the subject-matter (a maritime contract), and (b) of the person of the petitioner (its property the steamship *Wilja* having been attached), but since, at the same time, the cause was one of which the District Court, in the exercise of its sound discretion, should decline to exercise its admitted jurisdiction, the petitioner applied to the District Court for appropriate relief. The Court was asked to decline jurisdiction since the controversy was one between a French co-partnership and a Finnish corporation arising out of a contract, entered into at London, to transport goods from Canada to Holland or Belgium. The clause providing for arbitration at London was referred to as indicative of the intention of the parties that English law should apply.

XI. On January 26, 1940, District Judge Moscowitz filed his opinion (R. pp. 77-79) declining jurisdiction of the cause. After reciting the undisputed facts, the District Judge concluded:

> "This Court therefore should decline jurisdiction (citing cases) and the parties should be relegated to arbitration in London."

XII. On January 29, 1940, the respondents moved the Court for reargument. In their motion papers they asked the District Judge to condition his refusal to entertain jurisdiction upon the petitioner's appearing in an arbitration proceeding in London, to be commenced by the respondents, and upon the petitioner filing equivalent security in London;

in the alternative, respondents prayed that the Court reconsider its decision to decline jurisdiction and asked it not only to retain jurisdiction, but to stay the cause "pending the hearing and determination of an arbitration proceeding in London to be commenced by the libelants herein and had in accordance with the terms of the arbitration clause provided for in the contract of charter and the entry of an order thereon in this Court" (R. p. 80).

XIII. On February 7, 1940, Judge Moscowitz filed a further opinion (R. pp. 85-86) refusing to qualify his previous decision to decline jurisdiction.

XIV. On February 27, 1940, a final decree was entered in the District Court which, after reciting the proceedings, "ORDERED, ADJUDGED AND DECREED that the libel herein be and the same hereby is dismissed with costs but not on the merits; the Court, in its discretion, declining jurisdiction" (R. p. 89).

XV. On March 4, 1940, respondents appealed to the United States Circuit Court of Appeals for the Second Circuit (R. p. 91); and on July 18, 1940, said Circuit Court of Appeals filed its opinion reversing the decree of the District Court on the ground that the District Judge had been guilty of an error of law in "relegating the parties to arbitration in London." In this connection the Circuit Court of Appeals said (R. pp. 145-146):

> "It seems clear to us that the libelants have shown that this is not a case in which the arbitration provided for in the charter-party can be regarded as a condition upon the maintenance of the cause of action * * *. Accordingly, the arbitration clause became wholly inapplicable to the case."

As authority for its decision the Court cited only *The Atlanten*, 252 U. S. 313; *Jureidini* v. *National British and Irish Millers Insurance Co., Ltd.*, [1915] A. C. 499, and *Hirji Mulji* v. *Cheong Yue Steamship Co., Ltd.*, [1926] A. C. 497.

Reasons for Granting the Writ.

XVI. It is submitted that this Court should issue its writ of certiorari and reverse the decision of the Circuit Court of Appeals and reinstate the decision of the District Court for the Eastern District of New York for the following reasons:

(a) The question involved is one of far-reaching importance in its effect upon international commercial relations. Most important contracts provide for arbitration of disputes, and this is now sanctioned and made enforceable by a Federal statute, The United States Arbitration Act: U. S. Code, Title 9; Act of February 12, 1925, C. 213; 43 Statutes at Large, 883. The contract in the case at bar was entered into in England and was subject to English law, and the parties, by their solemn agreement, referred all disputes arising out of the contract to an English tribunal. The decisions cited by the Circuit Court of Appeals do not support its conclusion, and if there be any language in the cited cases supporting the conclusion of the Circuit Court of Appeals, that language, whether or not it correctly reflected the law at the time it was written, does not correctly reflect the law to-day.

(b) The decision of the Circuit Court of Appeals constituted an unwarranted interference with the right of District Courts to determine, in the exercise of their own sound discretion, of what cases involving controversies between non-resident aliens they shall retain jurisdiction, and was not in accord with the principles laid down by this Court in the case of *Charter Shipping Co., Ltd.* v. *Bowring, Jones & Tidy,* 281 U. S. 515.

(c) In view of the prevalent present-day point of view, fostering the disposal of controversies by arbitration, as exemplified not only by the United States Arbitration Act, cited *supra,* and similar enactments of the other maritime

nations, but also by the decided cases, a decision such as that in the instant case should be corrected by this Court, in order that the lower courts may not hereafter be misled by it; this is particularly true since the decision here sought to be reviewed is principally based upon a misapprehension by the Circuit Court of Appeals of the decision of this Court in *The Atlanten,* cited *supra.*

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, directing that Court to certify and send to this Court, for review and determination, on a day certain to be named therein, a full and complete transcript of the record and proceedings in this cause, which is numbered and entitled on the docket of the Circuit Court of Appeals as "No. 393, October Term, 1939, Louis Louis Dreyfus, Jean Louis Dreyfus, Pierre Louis Dreyfus and Francois Louis Dreyfus, co-partners, doing business under the firm name and style of Louis Dreyfus & Co., Libelants-Appellants, against O/Y Wipu, as owner of the Finnish steamer Wilja, Respondent-Appellee"; that the decree of the United States Circuit Court of Appeals for the Second Circuit in the said case may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as may seem just.

O/Y WIPU,
By EDGAR R. KRAETZER,
Counsel for Petitioner,
80 Broad Street,
New York, N. Y.

I hereby certify that I have examined the foregoing petition and that, in my opinion, it is well founded and entitled to the favorable consideration of this Court, and that it is not filed for the purpose of delay.

EDGAR R. KRAETZER,
Counsel for Petitioner,
80 Broad Street,
New York, N. Y.

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Respondents.

BRIEF IN SUPPORT OF PETITION OF O/Y WIPU FOR WRIT OF CERTIORARI.

I

The Opinions Below.

The opinions of the District Court (R. pp. 77-79, 85-86) were filed on January 26 and February 7, 1940, respectively, and are reported together at 32 Fed. Supp. 247.

The opinion of the Circuit Court of Appeals (printed R. pp. 143-147) was filed on July 18, 1940, and is not yet reported.

The case came before the Court on a motion to decline jurisdiction, supported and opposed by affidavits. The mate-

rial facts were not controverted and are set out in the Court's opinion, and no findings of fact or conclusions of law were required.

II

Jurisdiction.

The date of the judgment entered herein by the United States Circuit Court of Appeals for the Second Circuit, reversing the decision of the District Court, is August 6, 1940 (R. p. 147).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938; U. S. Code, Title 28, Section 347.

III

Statement of the Case.

The facts are sufficiently stated in the petition, *supra,* at pages 1 to 5.

There are two questions for decision:

(a) Whether the Circuit Court of Appeals was justified in reversing the decree of the District Court in a case in which admittedly (R. p. 147) the question of whether to retain or decline jurisdiction was one for the sound discretion of the District Court and where the Circuit Court of Appeals has not found, as a matter of law, that the discretion of the District Court has been abused; and

(b) Whether, when the parties to a contract of charter-party have contracted that all disputes arising out of the contract shall be referred to arbitration, the arbitration clause becomes null and void with respect to matters arising

while the charter-party was in full force and effect, simply because at a subsequent time the shipowner (rightly or wrongly) declines to make further performance of the charter-party on the ground that it has been frustrated.

IV

Specifications of Error.

The Court of Appeals erred (1) in interfering with the sound discretion of the District Judge with respect to matters as to which his discretion, and not theirs, must control; and (2) in holding the arbitration clause of the contract in suit null and void.

V

Argument.

POINT I

It was within the power of the District Court in the exercise of its sound discretion to decline jurisdiction of respondents' suit.

In *Canada Malting Co., Ltd.* v. *Patterson Steamships, Ltd.*, 285 U. S. 413, 76 L. Ed. 837, this Court said (p. 418):

> "The libelants concede, as they must, that in a suit in admiralty between foreigners it is ordinarily within the discretion of the District Court to refuse to retain jurisdiction; and that the exercise of its discretion will not be disturbed unless abused."

The Court further said (p. 421):

> "The rule recognizing an *unqualified* discretion to decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions in the lower Federal Courts." (Italics ours.)

In *U. S. Merchants & Shippers Ins. Co.* v. *A/S Den Norske Africa og Australie Linie* (*The Tricolor*), 65 F. (2d) 392 (C. C. A. 2d), the Court said (p. 392):

> "Both sides concede that had the Dutch shipper itself moved in the suit, jurisdiction would have depended upon the discretion of the Court; each party would have been an alien, and the District Court is not obliged to try such cases; its jurisdiction depends upon whether its exercise is essential to justice; whether the libelant is driven to seek it in order to secure any adequate redress at all."

In the *Tricolor* case the cargo was shipped from Norway and Germany to China, the cargo owner being Dutch and the shipowner Norwegian.

See too:

Goldman v. *Furness, Withy & Co.* (S. D. N. Y.), 101 Fed. 467.

Malcomess & Co., Ltd. v. *SS. New Texas and Elder Dempster & Co., Ltd.* (E. D. N. Y.), 1926 A. M. C. 1514 (not elsewhere reported).

The Lady Drake (E. D. N. Y.), 1 Fed. Supp. 317.

The same doctrine has been consistently followed by the courts in countless other decisions, the majority of which are assembled in the footnote to the decision in the *Canada Malting Co., Ltd.*, case, *supra.*

The point of all of the decisions is, of course, that the primary purpose of United States courts is to determine issues between our own citizens, and that while in exceptional cases the Court may in the interests of comity be willing to take up its time with controversies between foreigners, with consequent loss of time available to it in disposing of issues rightfully before it, it should do so only in cases where otherwise the libelant will be deprived of any relief.

In *Cuba Railroad Co.* v. *Crosby,* 222 U. S. 473, 56 L. Ed. 274, Mr. Justice Holmes said (p. 480):

> "But it should be remembered that parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle with their affairs and remitted them to the place that established and would enforce their rights."

POINT II

The District Court, having in the exercise of its discretion declined jurisdiction of the suit, was not subject to reversal by the Circuit Court of Appeals.

It is well settled that the Circuit Court of Appeals is without authority *to substitute its discretion* for the discretion of the District Court. Even though that Court might be of the opinion that had it been sitting as a District Court it might have retained jurisdiction of this cause, it may not reverse the District Court's decision on that ground alone. This rule was restated by Mr. Justice Stone in the comparatively recent case of *Charter Shipping Co.* v. *Bowring, Jones & Tidy,* 281 U. S. 515, 74 L. Ed. 1008, where he said (pp. 518-519):

> "* * * it was for the district court to say, as it did, upon a consideration of all the circumstances, whether it should decline 'to take cognizance of the case if justice would be done as well by remitting the parties to the home forum.' * * *
>
> It was for the District Judge to consider the facts appearing and the inferences which he might draw from them, and reach his own conclusion as to the convenience of witnesses, as well as the other factors upon which he decided that justice would be best served by leaving the parties to their suit in England."

POINT III

There has been no abuse of discretion in this case.

The respondents in their affidavits, their assignments of error and their briefs advanced a great number of sophisms in an endeavor to mislead the Circuit Court into believing the District Court's refusal to entertain jurisdiction constituted an abuse of its discretion. Respondents' principal argument was devoted to an attempt to establish that the controversy is one involving American interests. They claimed, for example, that the contract was one made by "Louis Dreyfus & Co. *of New York,*" citing as their authority certain words in the printed charter form (Exhibit A, R. p. 28), which printed form recites that the charter is "between Antti Wihuri, managing owner of the steamship *Wilja* * * * and Messrs. Louis Dreyfus & Co. of New York, charterers." There is, of course, no such concern as "Louis Dreyfus & Co. of New York," or if there is, it is not suing here. Louis Dreyfus & Co. is a co-partnership, all of whose partners are citizens (R. p. 61) and residents (R. p. 52) of the Republic of France. The fact that a part of the cargo which the libelants intended to ship from Montreal on the *Wilja* may have been "American grain" is of no significance. The mere fact that a part of the grain may have been grown somewhere in the United States and shipped via the Great Lakes to Montreal does not convert a French partnership into a New York concern; it would be extraordinary if the character of a contract entered into at London between French and Finnish companies could be made to acquire New York attributes simply because part of the cargo intended to be delivered to the ship at Montreal had been grown in our Western wheat fields.

Further, although the printed form which was made the basis of the charter-party contains the words "Louis Dreyfus & Co. of New York," the major portion of the contract is

contained in a typewritten rider (also reproduced at page 28 of the Record) which reads in part:

> "15. Owner to declare laydays and cancelling dates to Louis Dreyfus & Co., London, as soon as he is in a position to do so. On receipt of such declaration, Messrs. Louis Dreyfus & Co., London, to declare whether they will execute or cancel this charter party."

The typewritten clause is, of course, entitled to much more weight than any printed form, and in it respondents are referred to as Louis Dreyfus & Co., London. It is submitted that there is more significance in the addition of the word "London" in typewriting than there is in the addition of the words "New York" in print.

See: *Dexter & Carpenter, v. U. S.*, 13 F. (2d) 498, 500.

The respondents made a great deal of the fact that the testimony of the *Wilja's* officers could have been taken at New York. If the fact that the crew of a vessel is available at the port where she is libeled were of controlling importance, courts would never decline jurisdiction. Obviously the *Wilja* would not lie idle in New York until the case might be reached for trial. She was bound to be bonded, if possible; and, indeed, at the time when the matter was argued, she had been bonded, and was about to proceed on her business. There was no more reason to suppose that the ship's officers would be available at New York when the case came on for trial than that they might be available, or at least their testimony available, in proceedings in Finland or London. Their affidavits could, of course, be used on an arbitration in London and their testimony by deposition could be taken anywhere for use abroad. As Judge Campbell said in *The Lady Drake, supra:*

> "None of the real parties in interest are in New York and the Canadian witnesses as well as the wit-

> nesses aboard a Canadian Vessel, in a Canadian case, may well be produced before a Canadian court, or their depositions taken, and in so doing no unnecessary inconvenience will be caused" (1 Fed. Supp., at p. 319).

In the last analysis, whether the petitioner will be held to have breached its charter-party with the libelants will depend upon the determination of the questions (1) whether the *Wilja* was seaworthy, (2) whether due diligence was exercised to make her so, and (3) the time from which these obligations speak. Consequently, it is unquestionably true (a) that to support petitioner's case it will be desirable—and, indeed, necessary—to obtain the testimony of some, at least, of the ship's officers with respect to conditions aboard the vessel and (b) that the petitioner's case may be seriously prejudiced if, when the matter comes on for determination on the merits, it fails to produce such testimony. This, however, patently does not concern the respondents. The speciousness of their solicitude of petitioner's welfare in this connection is obvious from the fact that, if the latter is unable to obtain this testimony, the respondents will be just that much better off.

Respondents urged their need for the testimony of shipyard employees at New York with respect to the repairs made to the circulating pump and cylinder cover during the vessel's prolonged layup at the Brooklyn Shipyard following her breakdown at sea en route to Montreal on November 21st, which repairs were not completed prior to December 27th. However, as is pointed out in Mr. Statt's affidavit (R. p. 34), the testimony of shipyard employees at New York as to conditions found after the breakdown will be insignificant compared with the testimony of the shipowner's representatives, surveyors and shipyard people at Gothenburg where the vessel underwent her special classification survey shortly before her breakdown at sea. Testimony as to what transpired during the classification survey will be of the utmost importance. Obviously, all of this testimony

will be as readily available for use in Finland or in London as in New York. Indeed, there should be little difficulty in obtaining the personal attendance of at least some of these witnesses at a trial in Finland or on a London arbitration; on the other hand, the expense of bringing them to New York would be prohibitive.

A third class of necessary testimony relates to the making of the charter-party. There was no binding agreement whatsoever between the parties until the owner declared laydays and cancelling dates to Louis Dreyfus & Co., London, pursuant to clause 15 of the charter-party (see R. pp. 35-36). Until that time the contract was no more than an "illusory" one.* The owner, as was his right, declared laydays and cancelling dates only as part of the addendum which was entered into at London as a result of the settlement of November 18th (Exhibit B, R. p. 29). Respondents argue that no testimony would be required at London because it has been stipulated that the addendum (Exhibit B) was signed by and with the authority of petitioner (R. p. 71). On the contrary, testimony as to the agreement entered into at London on November 18th is of the utmost importance, in view of the allegations of the amended libel (Article Eighth, R. p. 24) to the effect that the agreement entered into at London on November 18th contained terms which are not set forth in the addendum (Exhibit B).

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* In view of the fact that a binding contract was entered into on November 18, 1939, which incorporated the terms of the purported agreement of August 17, 1939, we shall not burden the Court with a discussion of the cases supporting the undeniable fact that prior to the execution of the addendum of November 18th there was no binding agreement between the parties since the alleged agreement of August 17th was merely an illusory contract: See: *Williston on Contracts,* Vol. 1, Sec. 43, p. 126; *Strobe* v. *Netherland Co., Inc.,* 245 App. Div. 573, 577-578; *Metro-Goldwyn-Mayer Distributing Corp.* v. *Home Theatre Co.,* 71 F. (2d) 225, 226; *Interstate Iron & Steel Co.* v. *Northwestern Bridge & Iron Co.,* 278 Fed. 50; *Ellis* v. *Dodge Bros.,* 237 Fed. 860, 867; *Edgar* v. *Hewett Grain & Provision Co. of Escanaba,* 202 N. W. 972; *Daniel Boone Coal Co.* v. *Miller,* 217 S. W. 666; *National Surety Co.* v. *City of Atlanta,* 106 S. E. 179; *Motor Car Supply Co.* v. *General Household Utilities Co.,* 80 F. (2d) 167; *Miami Coca-Cola Bottling Co.* v. *Orange Crush Co.,* 296 Fed. 693; *Velie Motor Car Co.* v. *Kopmeier Motor Car Co.,* 194 Fed. 324.

POINT IV

The respondents were not entitled to a qualified order of dismissal.

Throughout their argument in the District Court and throughout their brief in the Circuit Court of Appeals respondents complained of the failure of the District Judge to qualify the dismissal upon the agreement of petitioner, (1) to appear in and proceed with arbitration in London *and* (2) to furnish equivalent security at London.

As to the first qualification, namely, that the petitioner should agree to appear on the London arbitration, there are several answers, any one of which is sufficient: (1) *the petitioner agreed in open court so to appear and arbitrate, and several times repeated this agreement in writing;* (2) the petitioner agreed so to arbitrate in the contract sued on, and there is and can be no allegation anywhere that it has at any time declined to comply with its agreement in this respect; (3) the British Arbitration Act is amply implemented with provisions whereby if one party declines to proceed with arbitration, the other party may proceed alone and obtain a binding judgment with his nominee acting as sole arbitrator.

Respondents' complaint that the Court failed to qualify its dismissal upon the furnishing of equivalent security in London merits the same criticism.

Of all of the great number of cases of which our courts have declined jurisdiction, the respondents, prior to the entry of final decree herein, were able to find only one case in which the dismissal was conditioned upon the furnishing of security in a foreign jurisdiction. That was the case of *Canadian Malting Co., Ltd.* v. *Patterson Steamships, Ltd.* (*supra*), which is discussed and distinguished in Judge Moscowitz's opinion (R. p. 86). It is true that there Judge Hazel conditioned the dismissal of the case, pending in the Western District of New York, upon the respondent appear-

ing in Canada and filing a bond for recovery of damages there. However, the record on appeal in that case shows that respondent's counsel, in the moving papers, formally *offered* to furnish such security provided the libel was dismissed (see Record on Appeal, p. 45). It would have been extraordinary if libelant's counsel in the *Canada Malting Co.* case had not availed themselves of that offer by the inclusion of the provision in the order presented to Judge Hazel. Furtheremore, the situation in the *Canada Malting Co.* case was entirely different from the situation which prevails here, because in that case the libelants were entitled to security in Canada. In the instant case, however, the respondents have asserted, and can assert, no right *in rem*, and since the British Arbitration Act contains no provision comparable to Section 8 of the United States Arbitration Act with respect to security, the respondents are not entitled to security in the jurisdiction to which they are remitted.

The parties, each apparently being satisfied with the financial stability of the other, in effect contracted that neither would require security from the other pending arbitration. There is no reason why the respondents should be placed in a better position by their unjustified seizure of the *Wilja* at New York than they would have been had they proceeded to enforce their rights in a proper jurisdiction.

POINT V

The Circuit Court of Appeals wholly misconceived the decision of the District Court.

In its decision the Circuit Court of Appeals dealt with the question of the enforceability of the arbitration clause, just as if the situation were one in which the petitioner, over the opposition of respondents, had sought an order directing the parties to proceed to arbitration under the provisions of Section 4 of the United States Arbitration Act, or alternatively as one in which the petitioner, over the

opposition of respondents, had sought to stay the further prosecution of the cause, pending arbitration, pursuant to Section 3 of the United States Arbitration Act. No such relief was sought by petitioner, and the propriety of granting such relief was not before the District Court at the time when it declined to exercise jurisdiction. On the reargument, respondents, not petitioner, asked the District Court for a stay pending arbitration in London pursuant to Section 3 of the United States Arbitration Act, but the District Court refused to reconsider its determination to decline jurisdiction and refused respondents' request that it merely stay the suit pending such arbitration. The situation before the District Judge was one in which non-resident alien charterers were suing a non-resident alien shipowner on a charter-party involving only transportation between foreign ports. It so happened that the contract in question contained a provision for arbitration in London. The respondents, aside from their right to sue the petitioner in Finland or in London, where the libel alleged that the petitioner had its duly appointed agent (R. p. 21), or in France, respondents' domicile, or, for that matter, anywhere else in the world where respondents could obtain jurisdiction of petitioner and persuade the Court to hear their cause, had pleaded a contract containing an arbitration clause. Whether or not this clause could be *enforced* against the wishes of either party, it certainly constituted a lawful method of disposing of the issues, if the respondents sought to invoke it, and the petitioner, as has been shown, agreed to appear in and proceed with the arbitration when and if commenced by the respondents. In stating in the conclusion of his opinion that the parties were "relegated" to arbitration at London (R. p. 79), the Judge did not purport to limit the respondents to that relief. Since the petitioner was willing to arbitrate, and since the respondents apparently also required arbitration, the District Judge quite naturally assumed that if he declined to entertain the suit here, the parties would proceed to arbitrate the issues at London. *He limited his decision, however, to dismissal of*

the suit pending at New York, specifically stating that the dismissal was not on the merits (R. p. 89), *thereby in no way limiting the right of the respondents to arbitrate or litigate in other jurisdictions as they might be advised.*

POINT VI

The Circuit Court of Appeals erred in holding as matter of law that the arbitration clause in the contract sued on was null and void and had become "wholly inapplicable to the case."

At the outset it should be noted that the suit is stated to be "in a cause of contract" (R. p. 20) and that the contract upon which the suit is brought is not only pleaded *in extenso,* but is annexed to the amended libel as Exhibit A and Exhibit B (R. pp. 28-29). The contract sued on contains the arbitration clause, and there is no allegation in the pleadings that the arbitration clause is not binding upon the parties.

That it was the intention of the parties that English law should apply is obvious. The fact that a clause providing for arbitration in England is included in the contract "imports English law as the law governing the transaction" (*Vita Food Products, Inc.* v. *Unus Shipping Co.,* [1939] A. C. 277, 290), and all of the other facts in connection with the contract support this conclusion. Accordingly, if it was the contention of the respondents that because of some peculiar provision of English law the arbitration clause was null and void, they should have so pleaded.

The arbitration clause in question was in the broadest terms, providing for arbitration in London of "all disputes from time to time arising out of this contract" (R. p. 33).

The Circuit Court of Appeals held that the arbitration clause was null and void on the ground that the petitioner had "repudiated" the charter-party. It is difficult to comprehend what the Circuit Court of Appeals meant by this, in view of the undisputed facts before them. Those facts

were that on November 20, 1939, the *Wilja,* in accordance with directions of the charterer, left New York, where she happened at that time to be, and proceeded towards Montreal in ample time to make her cancelling date of November 28th; that after departing from New York, owing to an accident to her machinery, she was compelled to put back to New York for repairs; that these repairs necessarily detained the vessel at New York until December 27th; that meanwhile and prior to December 15th the Port of Montreal closed for the winter; that consequently it would have been impossible for the *Wilja* to proceed to Montreal and load the respondents' cargo before the following spring; that the shipowner declined to agree to make an entirely different voyage from New York to the Continent; that at the conclusion of the repairs, the owner chartered the vessel to another company for a voyage to the Continent; and that on that voyage and prior to February 27, 1940, the *Wilja* was sunk (R. p. 98). The vessel having been sunk during the winter, any question of a possible obligation of the shipowner to carry the respondents' cargo from Montreal to the Continent in the spring of 1940 became moot.

As stated, the arbitration clause called for arbitration of all disputes arising out of the contract, and it is difficult to conceive of disputes which more clearly arise out of the contract than those which are the subject-matter of the libel herein. It seems perfectly clear that the principal question to be decided by the arbitrators, assuming arbitration is had, is whether the admitted failure of the *Wilja* to reach Montreal before that port was closed for the winter was due to causes for which the shipowner is responsible—i. e., some unseaworthy condition of the *Wilja*—or whether it was due to some cause from the consequence of which the shipowner was excused by reason of some term, express or implied, of the contract sued on.

A possible subsidiary point is the question of whether the original voyage from Montreal to the Continent having become impossible of performance, the shipowner was obli-

gated by reason of some provision, express or implied, in the contract sued on to make a substituted voyage from New York to the Continent.

Both of these questions arise out of the contract and, it is submitted, are precisely the type of questions which the parties contemplated should be submitted to arbitration rather than to court decision when they entered into the contract sued on.

The shipowner at no time repudiated the contract sued on. It admitted and, at the request of respondents' proctors, stipulated (R. p. 71), that the contract was duly entered into. It made no suggestion that the contract or any of its terms, were illegal or unenforceable, and at no time did it repudiate the arbitration clause of the contract. On the contrary, it repeatedly stated that it would appear in and proceed with the arbitration which the respondents declared they intended to commence at London.

The Circuit Court of Appeals referred to an alleged repudiation of the original charter-party of August 17, 1939, for supposed lack of consideration; but assuming, for the sake of argument, that the charter of August 17th had been repudiated on the ground asserted, that had nothing to do with the present controversies between the parties, because an admittedly valid contract was entered into on November 18, 1939, which specifically incorporated all of the terms and conditions of the earlier charter-party, including the arbitration clause.

The Court then seeks to find repudiation in the refusal of the petitioner to make a substituted voyage from New York to the Continent, but certainly the petitioner in taking the position that it was not obliged to make this substituted voyage by reason of the terms of the charter-party, was not repudiating the contract, but, on the contrary, was affirming and relying upon it.

The Court next spells out repudiation from the fact that some two weeks after the libel was filed, the shipowner, rather than permit his vessel, which had already lain idle for

some six weeks undergoing repairs, to lie idle until spring, had, instead, quite properly chartered her for a transatlantic voyage. It is difficult to see how this exercise of sound business judgment by the shipowner can be construed as a repudiation of the charter-party. At this time, according to the allegations of the libel, the respondents had already sustained their damage in that the respondents had "been forced and compelled to secure other transportation" at a greatly increased freight rate (R. p. 25), and since the St. Lawrence was closed for the winter, the petitioner could not deliver the vessel at Montreal. Furthermore, at this time the respondents had already commenced their suit for breach of charter. The petitioner had quite properly on December 15th notified the charterer that it considered that the charter-party had come to an end by reason of the closing of the St. Lawrence for the winter and suggested that the charterer so agree. The charterer did not so agree; on the contrary, it claimed that the charter-party was in full force and effect and commenced the suit at bar.

As the only decision of a United States court cited on this point by the Circuit Court of Appeals was *The Atlanten* (*Aktieselskabet Korn-Og Foderstof Kompagniet* v. *Rederiaktiebolaget Atlanten*) (D. C., S. D. N. Y.), 232 Fed. 403, affirmed (C. C. A. 2d) 250 Fed. 935, and 252 U. S. 313, it is appropriate that the *Atlanten* case be given consideration. The *Atlanten* was a famous test case taken to the Supreme Court of the United States prior to the passage of the United States Arbitration Act in an unsuccessful attempt to obtain a ruling that our courts had *no jurisdiction* whatsoever of a suit brought on a charter-party containing an arbitration clause enforceable under the laws governing both contracting parties, although not enforceable in the then state of the American law. In the *Atlanten* case the shipowner, *without suggesting any legal justification for his action,* had notified the charterer prior to making any attempt to proceed on the chartered voyage that he would not carry out the contract. In other words, in that case there was, in fact, what is referred

to in the opinions as a *repudiation* of the contract by the shipowner, it appearing that the owner was of the opinion, subsequently proven to be erroneous, that he could repudiate the contract and at the same time obtain the benefit of a clause in the contract describing a penalty as liquidated damages.

It is true that the District Judge stated in the course of his opinion, as was the fact, that "the withdrawal was before the voyage began, even before the ship had been delivered," but his *ratio decidendi* was that there had been a "general repudiation of the contract" by the shipowner. That this was also the reason for the decision of the Circuit Court of Appeals appears from this Court's opinion. Mr. Justice Holmes said at page 315:

> "For this case it is enough that we agree substantially with the views of Judge Learned Hand in the District Court and Judge Hough in the Circuit Court of Appeals. Their opinion was that the owner repudiated the contract and that the arbitration clause did not apply."

In the instant case the situation is entirely different and the reasoning which led to the *Atlanten* decision is wholly inapplicable.

The libel alleges that the *Wilja,* having been released from a prior writ of foreign attachment on Saturday, November 18th, sailed from New York on Monday, November 20th. She had been instructed by the respondents' New York office to proceed to Montreal to load a cargo of soya beans; she left New York for Montreal in ample time to make her canceling date of November 28th, and with every intention, so far as appears, of loading and transporting the cargo. As respondents well know, en route to Montreal the *Wilja* sustained serious machinery damage, consisting of the fracture of a high-pressure cylinder cover and the collapse of her combination air and circulating pump. Fortunately she was able to limp back to New York, where she arrived the following day; she then proceeded to the Morse plant of the

Bethlehem Steel Corporation, 57th Street, Brooklyn, where it was found that the parts in question required renewal. These renewals required the making of castings, and as a result the *Wilja* was detained at the repair yard until December 27th (R. p. 103). Petitioner thus not only lost the use of the *Wilja* for almost six weeks, but also incurred heavy expense in effecting the required repairs. Respondents argued in the District Court, and will perhaps suggest here, that for the sole purpose of escaping its contract with the respondents the petitioner wilfully endangered the lives of the crew, risked its then highly valuable vessel and deliberately caused the serious damage to the vessel's machinery and consequent loss of time. When it is realized that had it not been for the breakdown of her machinery, the *Wilja* would have been able to make the chartered trip for the respondents, earn her freight from them and still have been free to make other and more profitable contracts prior to the time when she actually was freed from the repair yard, it becomes patent that any such suggestion on the part of the respondents was mere nonsense. The reason that the *Wilja* did not carry out its contract with respondents was simply because the intervention of winter and the consequent closing of St. Lawrence River navigation made performance of the contract impossible, despite petitioner's honest endeavor to comply with its legal obligations.

Although petitioner expects successfully to controvert any such allegation, it may ultimately be found that the reason for the *Wilja's* breakdown was a failure on the part of her owner to exercise due diligence with respect to seaworthiness of the vessel, and that consequently the respondent may be liable for damages because of the failure of the *Wilja* to reach Montreal and load her cargo prior to the closing of the St. Lawrence for the winter. However that may be, the question of whether the respondent was thereby guilty of a breach of contract is still clearly and undeniably a dispute "arising out of this contract" (R. p. 33) within the meaning of the arbitration clause.

See:

In re Canadian Gulf Line, Ltd. (The Soloy), 98 F. (2d) 711, 714.

In *Shanferoke Coal & Supply Corp.* v. *Westchester S. Corp.*, 70 F. (2d) 297 (C. C. A. 2), the Court said (p. 299):

> "Nor are we impressed with the notion that there was nothing to arbitrate. We may assume arguendo, though we do not mean so to decide, that if a party repudiates a contract in toto, he can neither insist on arbitration, nor compel the opposite party to do so. Jureidini v. National British Millers Ins. Co., (1915) A. C. 499; Aktieselskabet v. Rederiaktiebolaget Atlanten, (D. C.) 232 F. 403. Here, though the defendant failed to perform, that was not a repudiation, and the arbitration clause was for the very purpose of adjusting breaches. * * * If the clause is general in form, it makes no difference what may came up under it."

In affirming, this Court said (293 U. S. 449, at pp. 453-454):

> "THIRD. The plaintiff also contends that the defendant was not entitled to a stay because its answer raised no arbitrable issues; * * *. The reasons why these contentions are without merit are sufficiently stated in the opinion of the Court of Appeals."

The decision of the Circuit Court of Appeals in the case of *In re Utility Oil Corporation*, 69 F. (2d) 524, suggests that the *Atlanten* decision might have been otherwise had the case arisen subsequent to the enactment of the United States Arbitration Act.

It is undoubtedly true that the decision in the *Atlanten, supra,* would have been otherwise had the United States Arbitration Act been in effect, because this Act (Sec. 2) specifically extends the scope of arbitration agreements to controversies "arising out of the said contract *or the refusal to perform the whole or any part thereof.*"

In addition to the *Atlanten*, the Circuit Court of Appeals cites as authority two British cases. In the first case cited, *Jureidini* v. *The National British and Irish Millers Insurance Co., Ltd.*, [1915] A. C. 499, the House of Lords held that where an insurance company pleaded the invalidity of its policy, it could not plead in bar the failure of the assured to arbitrate where there was not a general arbitration clause in the policy, but merely a clause which provided ([1915] A. C. at p. 500): "XVII. If any difference arises as to the amount of any loss or damage, such difference shall, independently of all other questions, be referred to the decision of an arbitrator * * *." It would have been manifestly unjust to require the assured to go to the expense of arbitrating the limited question of the amount of his loss as a condition precedent to litigating with the company the question (admittedly not included within the arbitration clause) as to whether or not the company was liable at all.

The House of Lords, in the leading case of *A. Sanderson & Son* v. *Armour & Co., Ltd.*, 1922 Scotch Cases (House of Lords) 117, said in a situation where one party was refusing to proceed with a contract (p. 121): "The proposition that the mere allegation by one party of repudiation of the contract by the other deprives the latter of the right to take advantage of an arbitration clause, is unreasonable in itself, and there is no authority to support it." The *Sanderson* case was a Scotch appeal, but, as stated in the decision of the Privy Council in the case of *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co., Ltd.*, [1923] A. C. 480, at 489: "It was a Scotch case, but in no way depended upon any peculiarity of the law of Scotland."

In the case of *Macaura* v. *Northern Assurance Co., Ltd.*, [1925] A. C. 619, Lord Sumner, writing for the House of Lords, distinguished the *Jureidini* case, saying (p. 631):

> "It was held that the defendants could not both repudiate the contract in toto and require a performance of a part of it, which only became performable when liability was admitted or established. The pres-

> ent case is the converse. Here, an arbitration and award are conditions precedent to any action to enforce the policy. The defendants do not repudiate the policy or dispute its validity as a contract; on the contrary, they rely on it and say that according to its terms, express and implied, they are relieved from liability."

The situation referred to in the above quotation from the *Macaura* case is precisely the situation in the case at bar. The petitioner does not repudiate the charter-party or dispute its validity as a contract; on the contrary, it relies upon it and asserts that according to its terms, express and implied, it is relieved from liability.

As to the limited scope of the *Jureidini* case, see too:

> *Woodall* v. *Pearl Assurance Co., Ltd.,* [1919] 1 K. B. 593 (Court of Appeal).
> *Golding* v. *London and Edinburgh Insurance Co., Ltd.,* (1932) 43 Ll. L. Rep. 487.

The second British case cited by the Circuit Court of Appeals does not deal with the question of repudiation at all. In that case, *Hirji Mulji* v. *Cheong Yue Steamship Co., Ltd.,* [1926] A. C. 497, a charter-party of the steamship *Singaporean* had been entered into in November, 1916, pursuant to which the vessel was to be placed at the charterer's disposal in March, 1917. Prior to the time when the ship was to have been delivered to the charterer, she was requisitioned by the British Government. Two years later the requisition was lifted and the shipowner then requested the charterer to take delivery. The charterer declined on the ground that the charter had been frustrated by the requisition prior to the vessel being assigned to the charter. Thereupon the shipowner demanded arbitration and, upon the charterer's refusal to participate, proceeded to obtain an award in accordance with the provisions of the British Act.

The Court held that since the sole question for the arbitration was whether the charter had been frustrated, and since the dispute as to whether the vessel must be accepted by the charterer had arisen long after the alleged frustration, the arbitrator was without jurisdiction; but the Court was careful to point out that its decision referred only to disputes arising after the frustration. Lord Sumner, writing for the Privy Council, said (p. 503):

> "Accordingly, if it be the law that when a contract is frustrated it is brought forthwith to an end *as regards matters thereafter arising,* and if it was the fact that the contract had so come to an end before 1919, when for the first time an offer of the ship for service was effectively made, then the arbitrater could not clothe himself with jurisdiction by finding that there had been no frustration at all." (Italics ours.)

Obviously the instant case is distinguishable from the *Hirji Mulji* case in that here the question to be determined by the arbitrator is not whether the charter-party was frustrated, because indeed there can be no question but that it was, but whether by reason of events transpiring after the vessel had been assigned to the charter and before the frustration the shipowner is liable to the charterer in damages despite the frustration.

Aside from the fact that the *Hirji Mulji* case is distinguishable on the facts, it is to be gravely doubted whether the case was in fact correctly decided. In relieving a party of his obligations under a contract on the ground that it has been "frustrated", the Court is actually doing no more than reading into the contract an implied term which presumably the parties, had they given the matter thought, would have inserted. In other words, arbitrators, if they hold that the charter-party in the case at bar was frustrated because the Port of Montreal closed for the winter, are in reality doing no more than inserting into the charter-party by implication a provision that the vessel shall have to proceed to Montreal to load only if that port is not closed for the winter before she arrives.

In "The Law of Contract During and After War" (4th Ed., London, 1940), the learned author, W. F. Trotter, says (p. 130):

> "It has already been observed in the above discussion of impossibility of performance and frustration of adventure—two doctrines which are really one—that the true principle underlying them is the expressed or implied intention of the parties. * * * The principle is one of contract law. It depends on some condition expressed or to be implied in the contract itself, and not on something *dehors* the contract which ends the agreement."

In *Tamplin (F. A.) Steamship Company, Limited,* v. *Anglo-Mexican Petroleum Products Company, Limited,* [1916] 2 A. C. 397, Earl Loreburn said (pp. 403-404):

> "When our Courts have held innocent contracting parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved."

In the case of *In re Canadian Gulf Line, Ltd. (The Soloy)*, 98 F. (2d) 711, the Court, refusing to construe an arbitration agreement other than broadly, said (p. 714):

> "The disputes here arose out of a 'maritime transaction' and there was an agreement stated in the broadest terms to submit such disputes to arbitration. * * * Whether in any particular instance it (arbitration) is a desirable risk is not for us to say. It is a mode of procedure fostered by statute and in the present case invoked under the agreement of the parties. If they consent to submit their rights to a tribunal with extensive powers and subject to a most restricted review, they cannot expect the courts to relieve them from the effect of their deliberate choice."

LAST POINT

A writ of certiorari should be granted in order that this Court may review the decision of the United States Circuit Court of Appeals for the Second Circuit.

Respectfully submitted,

EDGAR R. KRAETZER,
Counsel for Petitioner.

HERBERT M. STATT,
JAMES MCKOWN, JR.,
of Counsel.

APPENDIX

Excerpts from the United States Arbitration Act. United States Code, Title 9, Arbitration.

* * * * * *

"§ 2. VALIDITY, IRREVOCABILITY, AND ENFORCEMENT OF AGREEMENTS TO ARBITRATE. A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (Feb. 12, 1925, c. 213, § 2, 43 Stat. 883.)

§ 3. STAY OF PROCEEDINGS WHERE ISSUE THEREIN REFERABLE TO ARBITRATION. If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. (Feb. 12, 1925, c. 213, § 3, 43 Stat. 883.)

§ 4. FAILURE, ETC., TO ARBITRATE UNDER AGREEMENT; PETITION TO UNITED STATES COURT HAVING JURISDICTION FOR ORDER TO COMPEL ARBITRATION; NOTICE AND SERVICE THEREOF; HEARING AND DETERMINATION. A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate

under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. * * *"

* * * * * *

"§ 8. PROCEEDINGS BEGUN BY LIBEL IN ADMIRALTY AND SEIZURE OF VESSEL OR PROPERTY. If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award. (Feb. 12, 1925, c. 213, § 8, 43 Stat. 884.)"

* * * * * *

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OCT 3 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940

No. 388

O/Y WIPU, as owner of the Finnish steamer WILJA,
Petitioner,

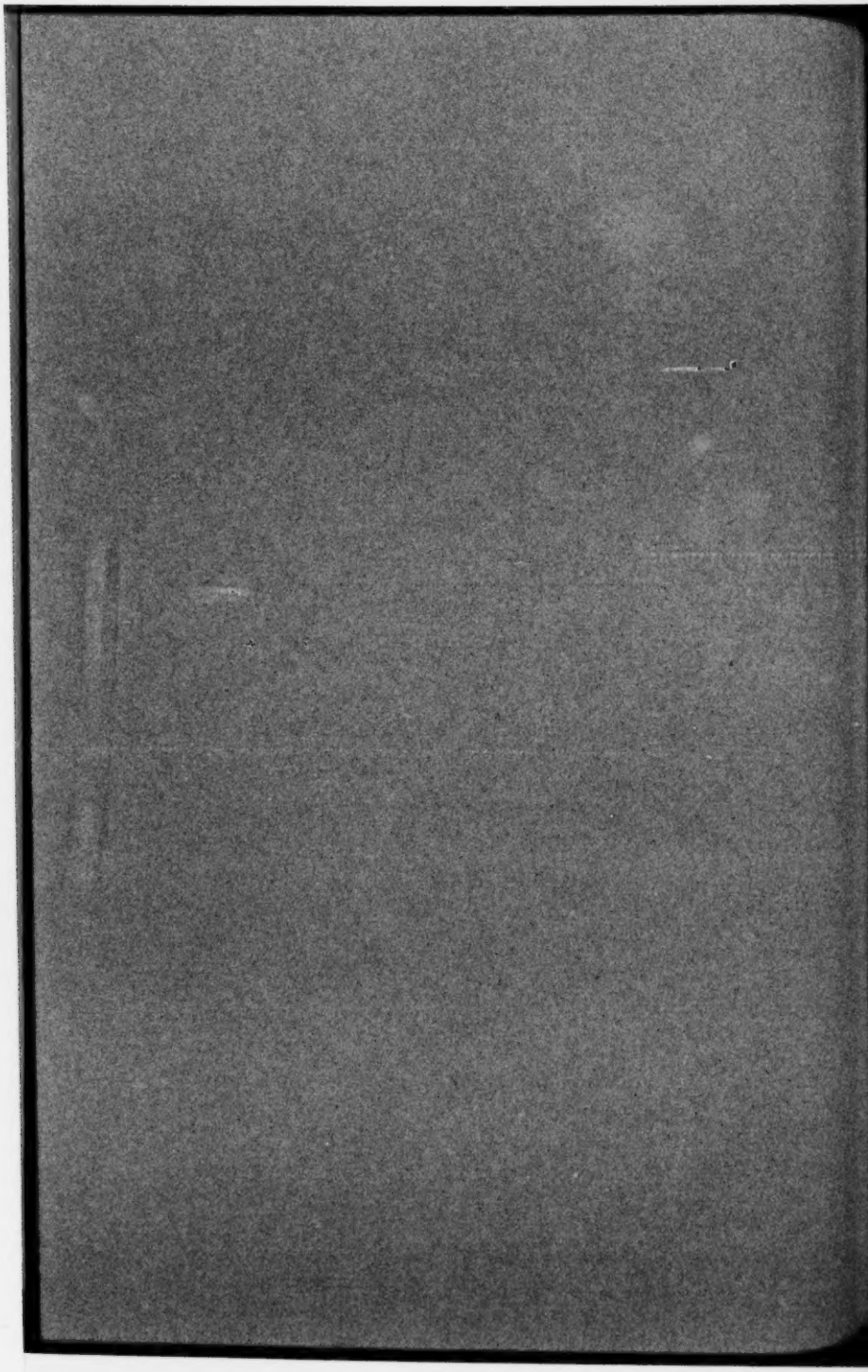
against

LOUIS LOUIS DREYFUS, JEAN LOUIS DREYFUS, PIERRE LOUIS DREYFUS and FRANCOIS LOUIS DREYFUS, co-partners, doing business under the firm name and style of LOUIS DREYFUS & Co.,
Respondents.

REPLY BRIEF SUBMITTED ON BEHALF OF PETITIONER

EDGAR B. KRAETZER,
Counsel for Petitioner.

HERBERT M. STATT,
JAMES McKOWN, JR.,
of Counsel.



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Respondents.

REPLY BRIEF SUBMITTED ON BEHALF OF PETITIONER.

The filing of a reply brief is necessitated by the plain effort of respondents, throughout their 48-page brief, to confuse the issues.

I

At the top of page 4 of their brief, respondents state that the SS. Wilja "never sailed to and never loaded respondents' cargo at St. Lawrence ports or any other ports." It is true that the Wilja never loaded respondents' cargo, and it is true that she never reached Montreal or any other St.

Lawrence port. She did, however, *leave New York for Montreal* (R. p. 66), sailing about noon on November 20th, but she was compelled to return to New York on the following day.

II

At the foot of page 4 of respondents' brief, the following appears:

> "Upon the motions before the District Court petitioner denied the very existence of the contract of charter sued upon (Statt, 106)."

This statement is repeated in slightly varied form and usually in italics throughout respondents' brief.* The statement that petitioner denied the existence of the contract sued upon, or alleged that the contract did not exist, is not only deliberately misleading but is, in fact, wholly incorrect. The authority cited by the respondents for their assertion (fol. 106) is found on page 36 of the record, and the words quoted by respondents have been torn from their context. The contract in suit is incorporated in Exhibit B (R. p. 29), the addendum executed at London on November 18, 1939, and in Exhibit A (R. p. 28), the original charter party signed at London on August 17, 1939, all the conditions and exceptions of which, except those modified by the addendum, were incorporated by reference into the addendum, which specifically provided (R. p. 29, fol. 87):

> "All other conditions and exceptions of charter-party remaining unaltered."

Among the conditions "remaining unaltered" was the arbitration clause. Petitioner argued in the District Court, and

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* See respondents' brief, page 6, fifth and sixth lines from bottom; page 9, line 5; page 9, lines 11 and 12; page 11, first paragraph; page 12, line 10; page 19, lines 19 and 20; page 27, lines 17 and 18; page 28, last paragraph; page 29, first paragraph; page 43, line 14; page 45, lines 2 and 3; page 45, six lines from bottom.

still asserts,* that prior to the execution of the addendum on November 18, 1939, the charter party of August 17, 1939, was not enforceable by either party, because although bearing the physical attributes of a contract, it reserved to the charterer an unqualified option to cancel the charter if and when the owner saw fit to declare lay days, but *no such argument was ever advanced or suggested by petitioner with reference to the binding agreement of November 18, 1939,* pursuant to which the Wilja started for Montreal to load the cargo contracted to be carried by that contract.

As appears from a reading of folios 104 to 106, inclusive (R. pp. 35-36), petitioner's argument was as follows:

Prior to the execution of the addendum of November 18, 1939, respondents had filed a libel for alleged breach of the charter party of August 17th, and had stated their damages at $60,000. Thereafter the addendum of November 18th was executed which provided for twice the original amount of freight. Therefore, petitioner argued that since respondents in bringing the instant suit, after the execution of the addendum, still insisted that their damages were $60,000 (R. p. 10), it must follow either that respondents were demanding security in twice the amount to which they were entitled, or, alternatively, that they repudiated the addendum, and (although every indication in the libel was to the contrary), were attempting to base a cause of action on alleged breach of the original charter party at the lower freight. Petitioner accordingly argued that either respondents' damages arose under the second contract and could only be approximately half what they claimed (and that accordingly the security demanded was grossly excessive) or, alternatively, that *if* they were seeking damages for breach of the charter party of August 17th, then the libel must be dismissed *in toto,* because that charter party was only an illusory contract upon which no action lay for failure on the part of the petitioner to perform it, whether fortuitously or otherwise. At no time has petitioner suggested in any

* See petitioner's brief, page 17.

way that following the execution of the addendum at London on November 18, 1939, there was not a valid binding contract between the parties.

III

At page 10 respondents state, in reference to petitioner's agreement to arbitrate immediately upon respondents' indicating that arbitration was desired by them, that petitioner's oral agreement "was neither mentioned in nor supported by any affidavit until approximately 77 days after it was alleged to have been made * * *." Respondents wholly fail to mention that the statement referred to was, in substance, contained in a brief served by petitioner upon respondents' counsel on the date on which the oral statement was made, and that in a second brief served on respondents' counsel on February 5th, four days later, the following appears:

> "* * * Respondent has in its brief heretofore filed and on the hearing of this motion agreed, to proceed with arbitration in London; respondent has no objection to the entry of an order dismissing the libel herein conditioned upon its appearing in arbitration proceedings in London, provided only that it has assurance that libelants will go ahead there." (See affidavits of Herbert M. Statt and James McKown, Jr., verified April 20, 1940, on file in the District Court.)

IV

At the foot of page 10 respondents complain that no request for arbitration was made by petitioner. Petitioner was not complaining of any breach of contract by respondents, and hence was under no burden to initiate arbitration proceedings. Immediately upon the respondents' stating that they were about to commence arbitration proceedings in London, petitioner agreed to appear on and proceed with these proceedings.

In *Beechwood, American Creosoting Co., Libelant,* v. *SS. Beechwood et ano.,* 1937 A. M. C. 1485 (not elsewhere reported), Judge Caffey in the Southern District of New York said of a similar contention (p. 1486):

> "The burden was on the libelant to initiate proceedings for arbitration. This the libelant has not done. There was no duty on the respondents to seek arbitration in the first instance. * * * Where the obligation to open the proceeding looking to arbitration rests on the libelant and the libelant has not sought it, obviously, as I believe, the respondents are not in 'default' with respect to procuring an arbitration. Only a refusal by the respondents to arbitrate after a request by the libelants to do so can constitute the default mentioned in Section 3. I should regard a holding otherwise as in defiance of what was ruled in the *Shanferoke* case (70 F. [2d] 297, aff'd 293 U. S. 449)."

V

At the foot of page 21, respondents state:

> "The within action was instituted in the only forum in which respondents could obtain jurisdiction over petitioner."

This statement is wholly incorrect. Petitioner is a Finnish corporation and is obviously subject to suit in Finland, which country is not at war. Furthermore, the libel alleges (R. p. 21) that the petitioner "has duly appointed agents for the transaction of its business in and about various ports in Europe." Among the agents referred to in the libel are H. Clarkson Company, Ltd., the well known London chartering firm.

The only allegation as to inability to obtain jurisdiction is contained in Article Second of the libel (R. pp. 20-21), wherein it is alleged that petitioner has no office for the transaction of business within the Eastern District of New York. Furthermore, as pointed out in our main brief, petitioner has repeatedly agreed to appear on and proceed with arbitration proceedings in London.

VI

At page 22 of respondents' brief, reference is made to the fact that the Wilja has sunk. This is wholly immaterial, since respondents have not, and have not asserted, any lien *in rem*.

VII

At pages 23-26, as Point IV, respondents raise a point which they likewise asserted in the Circuit Court of Appeals, although no mention of such a contention was made in the District Court. Respondents state (p. 26) that this matter was not passed upon by the Circuit Court of Appeals. It is true that the point was not discussed in the opinion of the Circuit Court of Appeals, but it is obvious that it must have been considered by that Court and decided adversely to respondents' contention; otherwise the Circuit Court of Appeals could not have reached its conclusion that the case is one in which the District Court had discretion as to whether or not to retain jurisdiction. The short answer to respondents' contention is that the principles of the cases cited by them under this point are wholly inapplicable to a situation, as the present, in which the Court admittedly has jurisdiction not only of the subject-matter but also of the person of the petitioner. In cases where a Court has jurisdiction of the subject-matter of a controversy, *but does not have jurisdiction of the person of the respondent,* it is true that the making of an alternative motion addressed to the merits is the equivalent of a general appearance, and hence confers jurisdiction of the person upon the Court. Despite a general appearance, petitioner here would have been free none the less to ask the Court in its discretion to decline to exercise further its admitted jurisdiction.

VIII

At page 26 respondents complain that the District Court "omitted and failed to consider the decisive, material and controlling facts." In view of the fact that the case was repeatedly argued and extensively briefed before the District Court, it can hardly be seriously contended or believed that Judge Moscowitz did not consider all of the facts. A complaint that he did not specifically find more facts than he did comes with bad grace from respondents, since, although they had ample opportunity, they chose to submit no formal findings to Judge Moscowitz. Petitioner repeats its statement that the facts found in Judge Moscowitz's opinion of January 26th were more than adequate to support the Court's conclusion of law that the case was one of which it should decline jurisdiction.

IX

At page 31, respondents cite the case of *Fairgrieve et al.* v. *Marine Insurance Company of London,* 94 Fed. 686, apparently in support of a contention that the Court may decline to exercise jurisdiction only "where for some special reason it appears to be inexpedient to exercise it." Petitioner submits that the rule is more accurately stated in the quotation from *U. S. Merchants & Shippers Ins. Co.* v. *A/S Den Norske Afrika og Australie Line,* 65 F. (2d) 392, which is cited and italicized by respondents at page 33 of their brief, that retention of jurisdiction "depends upon whether its exercise is essential to justice; whether the libelant is driven to seek it in order to secure any adequate redress at all."

X

At page 38 reference is made to the fact that the testimony of the master of the Wilja was limited to establishing the date on which the Wilja expected to sail from New York. The testimony at the hearing on December 20, 1939, at which

the master of the Wilja was called as a witness, dealt solely with the question of whether an immediate hearing of petitioner's motions was necessary. The minutes of this hearing appear in the record at pages 102 to 113, inclusive, and the most cursory examination shows that the scope of the testimony was so limited.

XI

At page 40 respondents state that "it was only *after* the District Court * * * had declined jurisdiction" that they requested and obtained the petitioner's oral agreement to arbitrate in London. This is true; but the respondents are none the less now estopped by this new agreement from refusing to arbitrate since it was confirmed in writing (*supra*, p. 4).

The District Court was asked by respondents to include in its order of dismissal a proviso

> "that respondent herein appear in an arbitration proceeding in London, *to be commenced by the libelants herein, and had in accordance with the terms of the Arbitration Clause provided for in the contract of charter* * * * or (2) In the alternative, for an order retaining jurisdiction over the within action but staying the further prosecution thereof in this Court pending the hearing and determination of an arbitration proceeding in London, *to be commenced by the libelants herein, and had in accordance with the terms of the Arbitration Clause provided for in the contract of charter*" (R. pp. 85-86; italics ours).

Irrespective of whether the contract in controversy contained an arbitration clause, the District Judge in his discretion would have been amply justified in declining to exercise jurisdiction and leaving the foreigners involved in the litigation to their remedies in other tribunals. If, as now appears to be the fact, the thought was entirely absent from respondents' minds that there was to be "an arbitration proceeding in London *to be commenced by the libelants herein*,"

it is hard to see how they can justify their appeal to the Court to include such a proviso in its order of dismissal. Respondents stated in their notice of motion (R. p. 80) in no uncertain terms their intention of commencing arbitration proceedings in London. They asked assurance that jurisdiction could be obtained of the petitioner in those proceedings. They received that assurance in unmistakable form and yet they now imply that it was never their intention to arbitrate; that the real purpose of their suit was to obtain a trial on the merits and not, as they asserted to the District Court, to obtain security under the provisions of Section 8 of the United States Arbitration Act (U. S. Code, Title 9).

Assuming, *arguendo,* that neither party, in the absence of further agreement by the other, could compel arbitration, respondents still cannot escape arbitration because they have lost, by their conduct in this case, any right which they might have had to object to arbitration.

XII

Adopting a practice that is to say the least unusual, respondents have annexed to their brief, at pages 47 and 48, photostatic copies of two letters, which they have labeled Exhibit C and Exhibit D. These are no part of the record, although respondents have very evidently endeavored to mislead the Court into thinking that they are, even though they add nothing in support of any relevant legal issue advanced by respondents. It is to be assumed that under the circumstances they will be disregarded by the Court, and accordingly no further comment will be made thereon.

Respectfully submitted,

EDGAR R. KRAETZER,
Counsel for Petitioner.

HERBERT M. STATT,
JAMES MCKOWN, JR.,
of Counsel.

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 388.

O/Y WIPU, as owner of the Finnish steamer WILJA,
Petitioner,

against

LOUIS LOUIS DREYFUS, JEAN LOUIS DREYFUS, PIERRE LOUIS DREYFUS and FRANCOIS LOUIS DREYFUS, co-partners, doing business under the firm name and style of LOUIS DREYFUS & CO.,
Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HENRY E. OTTO,
Counsel for Respondents.

SAMUEL C. OTTO,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 388.

O/Y WIPU, as owner of the Finnish steamer WILJA,

Petitioner,

against

LOUIS LOUIS DREYFUS, JEAN LOUIS DREYFUS, PIERRE LOUIS DREYFUS and FRANCOIS LOUIS DREYFUS, co-partners, doing business under the firm name and style of LOUIS DREYFUS & Co.,

Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The final decree in admiralty, declining jurisdiction and dismissing the libel, was reversed by the Circuit Court of Appeals for the Second Circuit for error of law in relegating the parties to arbitration in London and because of the great hardship caused to respondents by the District Court's declination of jurisdiction (C. C. A. Op. p. 147).

Respondents, a French co-partnership, doing business in New York, filed a libel to recover damages for breach of contract of charter of the Finnish steamship Wilja

Note: Emphasis is ours throughout, unless otherwise indicated.

and attached the said steamship under writ of foreign attachment (C. C. A. Op. p. 143).

The petitioner moved that the Court decline jurisdiction of the suit and also dismiss the libel on the ground that it did not state facts sufficient to constitute a cause of action and that the Court lacked jurisdiction of the suit (C. C. A. Op. p. 145).

Upon the said motions the District Court declined jurisdiction and relegated the parties to arbitration in London (Op. 235*), in reliance upon an alleged oral and disputed statement by proctor for petitioner that petitioner would appear in arbitration proceedings in London upon termination of the proceedings here (Op. Vol II. 377-8).

Respondents moved for reargument and, upon such reargument, for an order conditioning the Court's declination of jurisdiction by requiring petitioner to appear and file security in the arbitration proceeding in London (to which the parties had been relegated), or, in the alternative, that the District Court retain its jurisdiction but stay the within action pending the hearing and determination of the arbitration in London (237, 239).

The District Court declined respondent's motion for reargument and entered its final decree.

The Circuit Court of Appeals reversed the final decree and remanded the cause to the District Court with directions to exercise its discretion in regard to the retention of jurisdiction, and, if it should determine to retain jurisdiction, to decide the cause on the merits (C. C. A. Op. p. 147).

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* References are to folio numbers of Volume I of the Record. References to Volume II will be designated as "Vol. II— ".

Facts.

On August 17, 1939, a contract of charter of the S/S Wilja, in writing, was entered into by and between the New York office of the respondents, designated therein as "Louis Dreyfus & Co., of New York," and the petitioner. A photostatic copy of the said contract is attached to the libel and marked Exhibit "A" (R. p. 28).

Thereafter the value of chartered freight space substantially increased and the petitioner failed and refused to furnish the S/S Wilja for the loading of respondents' cargo, and, while the S/S Wilja was at New York, endeavored to obtain cargoes from other shippers at higher freight rates (Libel, 65, 66; 190-192; 216). Respondents thereupon commenced an action in admiralty in the District Court for the Eastern District of New York against petitioner for breach of said contract and obtained jurisdiction over petitioner by attachment of said vessel (Libel, 67; 191, 192).

On November 18, 1939, and while the aforesaid action was pending in said court, respondents and petitioner agreed to an amendment (Exhibit B annexed to the libel; 85-87), of the aforesaid charter, by the terms of which respondents agreed to pay approximately twice the original freight and consented to the immediate release of the S/S Wilja from attachment and petitioner agreed to cause the said S/S Wilja to sail and proceed forthwith from the port of New York to St. Lawrence loading ports and there load respondents' cargo (Libel, 68-70; 192-194, Exhibit "D" annexed to this brief).

Although respondents did immediately, and on the morning of November 18, 1939, formally consent to the discontinuance of the action then pending in the District Court and to the release of the S/S Wilja from attachment, petitioner failed to cause the S/S Wilja to sail forthwith from the port of New York as agreed, and the

S/S Wilja never sailed to and never loaded respondents' cargo at St. Lawrence ports or any other ports (Libel, 71, 72; 194).

While the S/S Wilja left New York about noon on November 20, 1939, it returned to New York the following day (194).

Before the libel herein was filed, and while the S/S Wilja was still at the port of New York, petitioner wholly repudiated the charterparty and in writing on December 15, 1939, insisted that the voyage was frustrated by the closing of the St. Lawrence River for the winter, refused to load at New York or other U. S. Atlantic ports, declared the charterparty terminated, and suggested that respondents immediately institute any action they might intend to bring (195, 196; C. C. A. Op. pp. 146-147; Exhibit "C" annexed to this brief). The within action was commenced by respondents promptly after receipt of the said notice of termination.

On or before December 29, 1939, the S/S Wilja was chartered by petitioner to others for a voyage from New York to Antwerp and/or Rotterdam (the ports of destination provided for in the charter as amended November 18, 1939) (Libel, Exhibit "B"; fols. 85-87), at a net freight of approximately $100,000 (*about $84,800 more than the freight provided for in respondents' charter of August 17, 1939, and about $68,800 more than the freight provided for by the amendment of November 18, 1939)* (218-224; 227).

The petitioner repudiated the contract of charter and wholly failed and refused to commence performance of either the contract of August 17, 1939, or the contract as amended November 18, 1939 (Libel, 65-66, 71-72; 169; 223), as the Circuit Court of Appeals has specifically found (C. C. A. Op. pp. 146, 147).

Upon the motions before the District Court *petitioner denied the very existence of the contract of charter sued upon* (Statt, 106).

The Parties.

A. *Louis Dreyfus & Co.*

Respondents have transacted business in New York and the rest of this country on a substantial basis for the past thirty years, being one of the largest exporters of United States grain (183).

The principal office in the United States is located at No. 2 Broadway, New York City, and is managed by Fernand Leval, a citizen of the United States, under written power of attorney to act for the respondents and to do in behalf of the American business of respondents, anything that respondents themselves could do (181, 182).

Respondents, for many years, have been members of fourteen leading grain and commercial Exchanges in the United States and have owned a grain elevator in the City of Minneapolis (184, 185).

Respondents pay substantial income and other taxes to the United States government as well as to the State of New York and other States (186).

The grain intended to be loaded by respondents into petitioner's S/S Wilja consisted in whole or in part of United States grain (189).

Certificate of transacting business as a co-partnership had been duly filed with the County Clerk of New York County prior to commencement of the within action (153-159; 186).

B. *O/Y Wipu.*

The petitioner is a corporation created, organized and existing under and by virtue of the laws of Finland (97), having an agent in the City of New York (Statt, 117).

The Contract of August 17, 1939 and the Contract as Amended November 18, 1939.

The contracts (Exhibit "A" and as amended Exhibit "B") are annexed to the libel (R. pp. 28, 29). They were signed in London on behalf of the New York office of Louis Dreyfus & Co. (187, 188). The charter, Exhibit "A," specially designates "Louis Dreyfus & Co., of New York" as Charterers (R. p. 28, lines 7, 8), and specifically provides that

> "Orders as to loading port to be given *on receipt of Master's application to* 'SESOSTRIS-NEW YORK' * * *" (Sesostris-New York being the cable address of respondents' New York office).

They were signed on behalf of the petitioner by H. Clarkson & Co., Ltd. (cabling brokers with authority limited to written or cable instructions from the petitioner) (249, 250).

The Real Questions Involved.

The real questions before this Court are:

1. Whether a ship owner, *who has wholly repudiated its* original *contract* of charter as well as its amended contract (even though the latter provided for twice the original freight), has failed and refused to enter upon the performance of either of said contracts, *and who has denied the very existence of the contract of charter sued upon* (Statt, 106), may demand or obtain the application or benefit of an arbitration clause contained in the said contracts.

This Court, in the case of *The Atlanten*, 252 U. S. 313, and the House of Lords in the cases of *Jureidini* v. *Na-*

tional British and Irish Millers' Insurance Company, Limited (1915), A. C. 499, and *Hirji Mulji* v. *Cheong Yue Steamship Company, Limited* (1926), A. C. 497, has already decided this question in the negative and the decision of the Circuit Court of Appeals in the within case is in accordance therewith.

2. Whether the Circuit Court of Appeals has the power to remand a cause to the District Court with directions to exercise its discretion (on all the proofs which the parties may choose to present) in regard to retention of jurisdiction, when the Record shows that a great hardship would be imposed upon one of the parties by the Court declining jurisdiction.

A denial of the writ is justified by *either* the answer of the first question in the negative or the answer of the second question in the affirmative.

ARGUMENT.

POINT I.

Petitioner has not established its right to the writ of certiorari.

The prerequisites for the granting of a writ of certiorari were succinctly stated in the case of *Magnum Import Co.* vs. *DeSpeturno Coty*, 262 U. S. 159, 163, where this Court said:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes: First, to secure uniformity of decision between those courts in the nine circuits; and second, to bring up cases involving questions of importance

> which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."

An examination of the petition and brief in support of this application discloses no conflict between decisions of the Circuit Courts and the question involved is not of such importance as to require in the *public* interest a further hearing.

Proctors for petitioner have heretofore stated under oath to the District Court (Statt, 100):

> "* * *. *There is no American interest whatsoever in any way concerned with the matter.*"

The only American interests involved are those of the respondents herein and the convenience of American witnesses at New York (C. C. A. Op. p. 147; 189-196; 215, 216; 218-228; 174; 176), all of which interests would be best subserved by a denial of the petition herein.

The decision of the Circuit Court of Appeals in the within case follows, and is in accordance with, the decision of this Court in *The Atlanten,* 232 Fed. 403, affirmed 250 Fed. 935, C. C. A. 2; affirmed by this Court, 252 U. S. 313, and is in accordance with the principles of law laid down by the House of Lords in *Jureidini, supra,* and *Hirji Mulji, supra* (C. C. A. Op. p. 146), and which principles of law continue to be recognized by the courts of this country and Great Britain.

Furthermore, the Circuit Court of Appeals, by its judgment herein, remanded the cause to the District Court with instructions to exercise its discretion in regard to retention of jurisdiction, and, if it should deter-

mine to retain jurisdiction, to decide the cause on the merits (C. C. A. Op. p. 147).

Petitioner, in its purported "Statement of the Case," assumes ([b] bot. p. 10, top p. 11 P. B.*) the existence of a fact which petitioner has heretofore denied, viz., that this matter arose out of and while the charter party was in full force and effect, and further erroneously assumes that it had made part performance of the contract. Petitioner has made no performance whatsoever under the contract, repudiated the charter party prior to the commencement of the action herein, and has denied the very existence of the contract (Statt, 106; C. C. A. Op. p. 146).

Relative to petitioner's question (a) (bot. p. 10 P. B.), the facts found by the Circuit Court of Appeals (C. C. A. Op. pp. 146, 147), and which facts are overwhelmingly supported by the Record, clearly show that the District Court abused its discretion.

Clear principles of law compelled the Circuit Court of Appeals to decide as it did. Neither courts nor litigants will be benefited by a further hearing in this case, and, consequently, there is no ground for the issuance of the writ prayed for.

POINT II.

The Circuit Court of Appeals was correct in reversing the District Court for error of law in relegating the parties to arbitration in London.

The District Court, by its order of April 29, 1940 (Vol. II, pp. 127-128) directed that there be included in the record on appeal a statement to the effect that proctor for petitioner "stated in words or in substance" that

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*References to Petitioner's Petition and Brief will be designated as p. — P. B.

upon the termination of the proceedings herein petitioner would appear in arbitration in London. In its memorandum decision of the same date, the District Court stated (op. Vol. II, fol. 378):

> "* * *. *The Court placed reliance upon that statement and declined jurisdiction.*"

The aforesaid alleged statement was *oral,* was *disputed* by proctors for respondents, was claimed to have been made at a hearing (in chambers) at which, *with the knowledge and consent of proctors for petitioner, no minutes were taken stenographically.* (Official Court Reporter Chadsey, Vol. II, fols. 374-375; Assignment of Error No. 8, sub-divisions 1, 2, and 3, Vol. II, fols. 408-411; Affidavit, Samuel C. Otto, verified April 18, 1940, on file in the District Court.)

The said "statement" was neither mentioned in nor supported by any affidavit until approximately 77 days after it was alleged to have been made and 51 days after the entry of the final decree and long after the appeal to the Circuit Court of Appeals was taken.

The District Court not only erred in declining jurisdiction in reliance upon such a "statement" but *also erred in assuming that petitioner was entitled to the application and benefit of the arbitration provision of the contract of charter.*

The District Court, after referring to the arbitration provision (Op. 234), stated (Op. 235):

> "This Court, therefore, should decline jurisdiction (citing cases) and the parties should be relegated to arbitration in London."

Nowhere, in the notice of motion or in the affidavits submitted in support thereof, *is there any request on the part of petitioner for arbitration* (141, 142; 247, 248).

Petitioner, in its affidavits in support of its motions, *affirmatively denied the very existence of the contract containing the arbitration provision* (Statt, 105, 106).

Furthermore, petitioner repudiated the contract of charter, failed and refused to load respondents' cargo, and terminated said contract (Libels, 65-72; Statt, 105, 106; Exhibit "C" this brief).

The Circuit Court of Appeals has specifically found (C. C. A. Op. p. 146):

> "* * *. The record indicates that *there was a repudiation of the amended charterparty by the respondent (petitioner) which was evidently doing everything it could to get higher freight rates on a rising market. Moreover it had already repudiated the original charterparty of August 17, 1939, for supposed lack of consideration* and had entered into the amended one of November 18, 1939, upon obtaining from the libellants an agreement to pay about double the original freight rates. *Even after obtaining this great concession the respondent (petitioner) soon began to insist that performance was impossible* because it could not load the ship at Montreal as that port was closed for the winter and *shortly afterwards took the technical position that it would not accept libellants' suggestion that it load their cargo at New York because under the terms of the charter it was not required to do so.* It followed this by entering into engagements with a new charterer for another European voyage. * * *. *Before the libel was filed the charterparty had already been repudiated by the respondent (petitioner), and the latter had insisted that the voyage was frustrated by the closing of the St. Lawrence River for the winter.* * * *."

By its new charter to others petitioner obtained a net freight of approximately $68,800 more than the freight provided for in respondents' amended charter, the voyage being from New York to Antwerp and/or Rotterdam, the identical ports of destination provided for in respondents' amended charter (218, 224; 227; Libel, 65-66; 71-72; Libel, Exhibit "B," 85-87).

The law is well settled that an arbitration clause does not survive a general repudiation of the contract, and that by denying the very existence of the contract containing the arbitration clause, by completely failing and refusing to commence performance of the contract, and by terminating the contract, petitioner waived any right to the application or benefit of the arbitration clause.

The Circuit Court correctly held (C. C. A. Op. bot. pp. 145, 146):

> "It seems clear to us that the libellants have shown that this is not a case in which the arbitration provided for in the charterparty can be regarded as a condition upon the maintenance of the cause of action. * * *. Under such circumstances it seems clear that the arbitration clause had no application to the right of the libellants to maintain the present suit. The decision of the Supreme Court in *The Atlanten*, 252 U. S. 313, and the rulings of the House of Lords in *Jureidini* v. *National British and Irish Millers' Insurance Company, Limited* (1915), A. C. 499, and *Hirji Mulji* v. *Cheong Yue Steamship Company Limited* (1926), A. C. 497, indicate that the parties should *not* have been relegated to London for arbitration. * * *. Accordingly the arbitration clause became wholly inapplicable to the case."

* * * * *

(Bot. p. 146, top 147)

"* * *. As Holmes, J., said in *The Atlanten*, 252 U. S. at p. 316:

'The clause obviously referred to disputes that might arise while the parties were trying to go on with the execution of the contract—not a repudiation of the substance of the contract. * * *' "

In *The Atlanten, supra*, a libel was filed in admiralty by the charterer to recover from the owner damages for the breach of a charter party. The respondent owner pleaded (232 Fed. 403, at 404):

"First. That the charter party had been made in Denmark, between two corporations of Sweden and Denmark, and that the charterer had made no tender of arbitration under an arbitration clause, valid in Denmark and Sweden, which reads as follows: '(21) If any dispute arises, the same to be settled by two referees, one appointed by the captain and one by charterers, or their agents, and, if necessary, the arbitrators to appoint an umpire. The decision of the arbitrators or umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration without leave of a court shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight.' "

Judge Learned Hand, in awarding to libellant a final decree against respondent, stated in part as follows (404, 405):

"* * *. It is clear that the respondent did not intend to rely upon the clause in the letter of January 8, 1915, and did not suppose the case was one for arbitration at all. What it did rely on was the

penalty clause, under which it thought itself protected, and which made it to its interest to repudiate as soon as freight got above 34 shillings. The attempt at justifying this repudiation wholly falls. The respondent violated its contract without any shadow of excuse. It even made the proposal to the libellant to take a new charter at 60 shillings, the libellant to bear the difference between that and the supposed limitation of liability. Any effort to mitigate this violation of good faith on the score of danger to the ship is answered by this proposal to undertake the same voyage."

* * * * *

"*The withdrawal was before the voyage began, even before the ship had been delivered.* Whatever be the rule applicable to arbitration clauses of more general form, there can be no doubt that this clause was meant to apply only to disputes which might arise during the voyage, and while the parties were at least trying to go on with its execution. *Indeed, the only authority upon the subject which has been cited seems to make it a general rule that such clauses do not survive a general repudiation of the contract. Jureidini* v. *National British Millers' Ins. Co.* (1915), A. C. 499. The theory appears to be that such a provision is part of the execution of the contract, a piece of its administration, and ought not to be construed as applicable to an entire change of purpose which results in the abandonment by one party of the enterprise as a whole."

Mr. Justice Holmes, in delivering the unanimous opinion of this Court, stated (252 U. S. 313, 315):

"With regard to the arbitration clause we shall not consider the general question whether a greater effect should not be given to such clauses than for-

merly was done, since it is not necessary to do so in order to decide the case before us. *For this case it is enough that we agree substantially with the views of Judge Learned Hand in the district court and Judge Hough in the circuit court of appeals. Their opinion was that the owner repudiated the contract and that the arbitration clause did not apply.* It is true that it would be inaccurate to say that the owner repudiated the contract *in toto*, for the letter that we have quoted assumed that the contract was binding, and referred to it as fixing the liability incurred. It meant simply that the owner would not proceed with the voyage. *United States* v. *McMullen*, 222 U. S. 460, 471, 56 L. ed. 269, 273, 32 Sup. Ct. Rep. 128. But we agree that such a refusal was not a 'dispute' of the kind referred to in the arbitration clause."

(316)

"* * *. The clause obviously referred to disputes that might arise while the parties were trying to go on with the execution of the contract,—not to a repudiation of the substance of the contract, as it is put by Lord Haldane in *Jureidini* v. *National British & I. M. Ins. Co.* (1915), A. C. 499, 505, (1915) W. N. 6, 84 L. J. K. B. N. S. 640, 112 L. T. N. S. 531, 31 Times L. R. 132, 59 Sol. Jo. 205. * * *"

* * * * *

"* * *. *We are of opinion that the decree was clearly right.*"

Had petitioner herein not repudiated the contract, and had petitioner tendered the S/S Wilja at the loading port, and had the dispute occurred while petitioner was trying to go on with the execution of the contract, petitioner would have been entitled to the benefit of the arbitration provision. The Circuit Court of Appeals recog-

nized such distinction in the case of *In re Utility Oil Corporation,* 69 Fed. (2) 524, 525, 526 (C. C. A. 2).

In *Jureidini* v. *National British & Irish Millers' Insurance Company, Limited, supra,* the House of Lords had before it an action at law by an assured on a policy of insurance which contained an arbitration clause. The defendant repudiated the claim *in toto* on the ground of fraud and arson, the effect of which, if they were right, was to cause the plaintiff to forfeit all benefit under the policy.

The case was tried before Darling, J., and a special jury who found for the plaintiffs, the Court giving judgment in amount of £3000.– The Court of Appeals reversed on the ground that the arbitration clause was a bar to the action.

The House of Lords reversed the Court of Appeals, Viscount Haldane, L. C., stating (504, 505):

> "Now, my Lords, no doubt it is true that the policy contains an arbitration clause with a very stringent addition to it, to the effect that the going to arbitration is a condition precedent to the right to sue; and if that had been all,—if the action had been brought upon a policy containing such a clause and no more had happened,—then, on principle and on authority, the claim could not have been maintained without fulfilling the condition precedent; because by the law of this country you can make most contracts which you desire, and, among others, a contract that you will not come under liability under a contract unless that liability is defined in a particular way, it may be by an arbitrator. * * *. But the present case, as I have already pointed out, is different; there has been in the proceedings throughout a repudiation on the part of the respondent of their liability based upon charges of fraud and arson, the effect of which,

if they are right, is that all benefit under the policy is forfeited. * * *"

* * * * *

"Now, my Lords, speaking for myself, *when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced.* * * *, *the arbitration clause having gone with the repudiation.*"

Lords Dunedin, Parker, Parmoor and Atkinson concurred.

The principle of law laid down in the cases of *The Atlanten* and *Jureidini* (*supra*) has continued to be recognized and, as late as 1938, the Court, in the case of *Canadian Gulf Line, Ltd. (The Soloy)*, 98 Fed. (2) 711, 714, C. C. A. 2, cited by petitioner to the Circuit Court of Appeals as well as to this Court (p. 31 P. B.), held:

"There was no repudiation of the charter-party such as was held to preclude resort to the arbitration clause in *The Atlanten*, 252 U. S. 313, 40 S. Ct. 332, 64 L. Ed. 586, nor was there a repudiation by way of defense going 'to the substance of the whole contract' as in *Jureidini* v. *National British and Irish Millers' Insurance Co., Ltd.* (1915), A. C. 499, 505."

In the case of *Hirji Mulji, supra*, the House of Lords stated (502):

"As the arbitrator was the judge, if at all, both of law and fact, the sole question is whether he had any jurisdiction to decide, as he purported to do, between the parties. This depends on the question whether or not there was any submission, *and that again on the question whether, at the time when it*

purported to be submitted to him, there was a dispute, subsisting between the parties, 'under this charter,' that is, a contract then subsisting.

That a person before whom a complaint is brought cannot invest himself with arbitral jurisdiction to decide it is plain. His authority depends on the existence of some submission to him by the parties of the subject matter of the complaint. For this purpose *a contract that has determined is in the same position as one that has never been concluded at all. It founds no jurisdiction.*"

* * * * *

(bot. 510, 511)

"* * *. An arbitration clause is not a phoenix, that can be raised again by one of the parties from the dead ashes of its former self. By its very terms, as well as by the fact that it was only one part of the indivisible charter, it had come to end also; it is unnecessary to consider in what terms, if any, a clause might have been framed which would have saved the clause alive in the event of the frustration of the adventure and the charter. It may be noted that in practically all the numerous cases of frustration of charters by requisitioning during recent years, the charter must have contained an arbitration clause, yet no point of this kind has apparently been raised on any ordinary form of charter. *The cases in general afford little support to the idea that any form of clause would survive the contract as a whole*: see *Edward Grey & Co.* v. *Tome & Bunge* (1914) 31 Times L. R. 137, 138 and *In re Hohenzollern Co.* (1886) 54 L. T. 596, 597, and conversely *Kennedy* v. *Barrow-in-Furness Corporation* in the Court of Appeal, reported in *Hudson on Building Contracts* (1909) Vol. ii, 4th ed., 411, 415."

(512)

"* * *. As for *Jurcidini's* case (1915) A. C. 499, insurers pleaded the absence of an award as to quantum only as a fatal nonfulfilment of a condition to the right to sue on a policy. As they had themselves repudiated the claim *in toto*, it was held that they could not insist on the absence of an award. It is a case of approbation and reprobation: see *Macaura* v. *Northern Assurance Co.* (1925) A. C. 619, 631.

Their Lordships' conclusion is that the arbitrator acted without jurisdiction and that the action on his award ought to have failed, * * *."

In the case at bar, as we have heretofore shown, petitioner not only abandoned the contract, repudiated the contract, terminated the contract, and refused to load and carry respondents' cargo, but even went so far, upon the motions, to state under oath (Herbert M. Statt, 106):

"Libellants, therefore, are in the position of suing upon a contract which does not exist."

It is respectfully submitted that the Circuit Court of Appeals was correct in reversing the District Court for error of law in relegating the parties to arbitration in London.

POINT III.

The District Court, by declining jurisdiction, abused its discretion and failed to exercise a sound discretion, and the Circuit Court of Appeals was correct in reversing the District Court.

As we have heretofore shown, the District Court erred in assuming that petitioner, despite its complete repudiation of the contract of charter, was entitled to the ap-

plication or benefit of the arbitration clause contained in the said charter.

But, even apart from and in addition to the above error of law, the District Court, in declining jurisdiction, abused its discretion and failed to exercise a sound discretion.

"Discretion," when invoked as a guide to judicial action, means a sound discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result (*Langnes* v. *Green*, 282 U. S. 531, 75 L. Ed. 520, at 526; Headnote 7).

The law is well settled that whether an admiralty court will take jurisdiction of suits between foreigners is a matter entirely within its discretion, and such suits will be entertained, unless some special reason is shown why the court should deny its aid.

Fairgrieve v. *Marine Insurance Co.*, 94 Fed. 686, 687, certiorari denied, 186 U. S. 484, 46 L. ed. 1261;

Danielsen v. *Entre Rios Rys. Co.*, 22 F. (2) 326, at Point (I), 327;

Panama R. Co. v. *Napier Co.*, 166 U. S. 280, 285, 17 S. Ct. 572, 41 L. ed. 1004;

The Belgenland, 114 U. S. 355, 5 S. Ct. 860, 29 L. ed. 152;

The Pesaro, 255 U. S. 216, 41 S. Ct. 308, 65 L. ed. 592;

The Fredensbro (D. C.), 18 F. (2d) 983, 1927 A. M. C. 1258;

Dominion Combing Mills v. *Canadian Pacific Ry.* (D. C.), 300 F. 992.

The case of *The Mandu* (C. C. A. 2), 102 Fed. (2) 459, involved a collision between the Brazilian steamer "Mandu" and the German steamer "Denderah" in Brazilian

waters. The "Denderah" went down and most of its cargo was lost. The Court, in reversing the District Court, stated (462):

> "(3-5) 2. The petitioner attempts to support the result below as an exercise of the power of the court to decline jurisdiction in a case where the interests concerned are foreign. * * *. So for jurisdictional purposes the case may be treated as one where the adversaries were German shippers on the one side and a Brazilian ship owner on the other. On such a basis the foreigners interested were of different nationalities; they had no common home to which they might be sent to try their case; no agreement had been made that litigation be carried on in a particular country. Under these conditions it would have been unusual to have declined jurisdiction even at an early stage. * * *"

In the case at bar, respondents and petitioner are of different nationalities; they have no common home forum to which they might be sent to try their case; chaotic conditions in Europe render it impracticable, if not entirely impossible, to obtain a determination of the issues herein by arbitration in London or by suit in Finland or England; almost all of the evidence required to try the within action is available at New York and is not available elsewhere (189-196; 215, 216; 218-228; 174; 176); the repudiation and breaches of the charter party occurred at New York; material and necessary witnesses are available at New York and are not readily available elsewhere; and no agreement has been made that litigation should be carried on in any particular country.

The within action was instituted in the only forum in which respondent could obtain jurisdiction over petitioner.

After the original contract was entered into the petitioner refused to allow the S/S Wilja to proceed to any belligerent port. It was therefore impossible to obtain jurisdiction over the petitioner in either Great Britain or France by the attachment of the S/S Wilja.

Since the District Court's decision (but prior to the entry of the final decree herein) the S/S Wilja was sunk (Vol. II, 412), and it is now impossible to obtain jurisdiction over the petitioner by the attachment thereof in any jurisdiction.

The Circuit Court of Appeals has specifically found (C. C. A. Op. p. 147):

> "* * *. In view of the widespread conflict in Europe and the chaotic conditions there it would seem a great hardship to the libellants for our courts to decline jurisdiction and thereby to require them to bring suit either in Finland or England. Proof of damages could apparently be readily obtained in New York. The repudiation of the charterparty was there and, if the seaworthiness of the vessel should become a factor in the litigation, proof of her condition could be most easily secured from New York witnesses, since the repairs were conducted there in November and December, 1939, and the condition of the Wilja must have been there known. * * *"

These findings are overwhelmingly supported by the record and are not inconsistent with any findings by the District Court.

Unless the decision of the Circuit Court of Appeals is sustained, and jurisdiction over petitioner is retained, respondents will be denied a hearing of their claim in any forum, and will be deprived of the security heretofore obtained by the attachment of the S/S Wilja, now sunk,—all of which will result in a complete denial of justice to respondents.

POINT IV.

By affirmatively invoking the jurisdiction of the District Court to pass upon the merits of the within action, respondent waived any right or personal privilege to object to the jurisdiction of the District Court, and the District Court erred in failing to dismiss respondent's concurrent motion for an order declining jurisdiction.

Petitioner, itself, affirmatively invoked the jurisdiction of the District Court to pass upon the merits of the within action, and moved for an order dismissing the libel for alleged failure to state a cause of action.

By order to show cause, dated December 19, 1939, petitioner moved the District Court for an order (90, 91):

"(1) Declining to take jurisdiction herein,
(2) Dismissing the libel herein for lack of jurisdiction, and
(3) *Dismissing the libel herein on the ground that it does not allege facts sufficient to constitute a cause of action,* * * *."

In support of the motions petitioner submitted two affidavits of Herbert M. Statt, wherein petitioner alleged under Points II and III (102-108) that:

> "Since, therefore, no warranty exists, the libel does not state facts sufficient to constitute a cause of action and should be dismissed" (103), and
>
> "As above stated, the suit is against the wrong respondent (petitioner), it is brought in the wrong jurisdiction, and the libel does not set forth a sufficient cause of action" (106, 107).

On the argument of the motions, and in the briefs submitted to the District Court, petitioner argued the merits

of respondents' cause of action and invoked the jurisdiction of the District Court, on the merits, to dismiss respondents' cause of action, alleging that the libel failed to state facts sufficient to constitute a cause of action (Argument before District Court, Dec. 28, 1939, Vol. II, pp. 115-125).

Proctors for respondents were compelled to and did meet, on said motions, the issues raised by petitioner on the merits.

The District Court, in its opinion dated January 26, 1940, in describing the motions before it, stated (Op. 230):

> "The respondent (petitioner) has appeared specially herein and made a motion for an order that the Court decline to take jurisdiction, that the libel be dismissed for lack of jurisdiction, *and that the libel be dismissed on the ground that it does not allege facts sufficient to constitute a cause of action.*"

The law is well settled that a party may not say that he is not properly before the court, and in the same breath argue that, if he be, there is no ground to hold him. The courts have found an inconsistency in such an attitude which has led them to insist that a motion upon the merits presupposes that the party is before the court.

As was stated by Parker, C. J., in the case of *Gulf Smokeless Coal Co., et al.* v. *Sutton, Steele & Steele, et al.*, C. C. A. 4, 35 Fed. (2) 433, 439:

> "* * *. There can be no question that such a motion, which invokes the judgment of the court as to the sufficiency of the pleading, amounts to a general appearance. Even though it be coupled with a motion to dismiss on jurisdictional grounds, it waives the question of jurisdiction; for one will not be heard to invoke and deny jurisdiction in the same breath.

Jones v. *Andrews,* 10 Wall. 327, 332, 19 L. Ed. 935; *St. Louis & S. F. R. Co.* v. *McBride,* 141 U. S. 127, 11 S. Ct. 982, 35 L. Ed. 659; *Edgell* v. *Felder* (C. C. A., 5th) 84 F. 69; *Christensen* v. *Christensen* (D. C.), 14 F. (2d) 475; *Nelson* v. *Husted* (C. C.), 182 F. 921; *Cyclopedia of Federal Procedure,* Vol. 3, p. 427."

Also see:

Armstrong, et al. v. *Langmuir, et al.,* 6 F. (2d) 369 at 371 (C. C. A. 2);

Kunglig Jarnvagsstyrelsen v. *United States,* 19 F. (2d) 761 at 762, 763 (C. C. A. 2);

Thames & Mersey Ins. Co. v. *United States,* 237 U. S. 19, 35 S. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915D, 1087.

As long ago as 1818 it was recognized that the filing of a plea to the merits constituted a waiver of any exception to the jurisdiction.

Mr. Justice Story, in overruling exceptions to the jurisdiction, in *The Abby,* Fed. Cas. 14, stated:

> "He has regularly filed a plea claiming the property and traversing the allegations of forfeiture in the libel. * * * A plea to the merits is an admission that the jurisdiction of the court is well founded; * * *."

Also see *The Ucayali,* 159 Fed. 800, E. D. N. Y., a case involving a suit by a foreign subject against a vessel of his own country, wherein it was held by Judge Chatfield that the right to object to the assumption of jurisdiction by a court of admiralty of the United States is waived by a general appearance and the filing of an answer by the claimant.

Petitioner, having affirmatively and concurrently invoked the jurisdiction of the court to pass upon the

merits of the within action, waived any right or personal privilege to object to the jurisdiction of the court.

The District Court, therefore, erred in failing to dismiss petitioner's motion for an order declining jurisdiction, and erred in failing to hold that petitioner had waived any right or personal privilege to object to the jurisdiction.

This matter was raised by respondents in the court below (Assignments of Error 1, 2, 3; 276-280) but was not passed upon by the Circuit Court of Appeals which reversed the District Court on other grounds.

POINT V.

Further answering the petition and brief of petitioner.

Answering the Petition.

The petition and brief in support of the petition do not sufficiently, fairly or correctly state the facts or issues.

It is refreshing to note that petitioner admits the District Court had jurisdiction (p. 4 P. B.). Upon the motions it requested an order dismissing the libel for alleged lack of jurisdiction (90; C. C. A. Op. p. 145).

The opinion of the District Court, instead of reciting "the undisputed facts," as claimed by petitioner (p. 4 P. B.) omitted and failed to consider the decisive, material and controlling facts, many of which are set forth in the opinion of the Circuit Court of Appeals (C. C. A. Op. pp. 145-147), and which omission on the part of the District Court was cited as error by respondents (Assignment of Error No. 15, 287-295).

It is significant that petitioner, in quoting from the opinion of the Circuit Court of Appeals (bot. p. 5 P. B.) has omitted these material facts.

This omission can hardly be claimed to be an accident, especially since petitioner (bot. p. 9, top p. 10 P. B.) again incorrectly states:

> " * * *. The material facts were not controverted and are set out in the Court's opinion, (referring to the District Court) * * *"

and again incorrectly states (p. 10 P. B.):

> "The facts are sufficiently stated in the petition, *supra*, at pages 1 to 5."

Petitioner has not established its right to the writ of certiorari (Point I herein).

Can it be that the "solemn agreement" referred to by petitioner (middle p. 6 P. B.) is intended to mean the contract of charter involved in this action and which petitioner abandoned, repudiated, terminated, refused to perform (C. C. A. Op. p. 146, Exhibit C, this brief), and which petitioner's own attorney heretofore, under oath to the District Court, claimed "does not exist" (Statt, 106). Or can it be that the contract of charter has the attributes of a chameleon—changing its characteristics with the exigencies of the moment?

The decision of the Circuit Court of Appeals corrected the obvious error of the District Court and remanded the cause to the District Court with instructions to exercise its discretion in regard to retention of jurisdiction (C. C. A. Op. p. 147).

From the facts found by the Circuit Court of Appeals, all of which are overwhelmingly supported by the Record, it is obvious that the District Court, in declining jurisdiction and relegating the parties to arbitration, not only had made an error of law but also had failed to exercise a sound discretion.

Answering Petitioner's Brief.

In its brief to this Court petitioner has *incorrectly* stated:

1. "The shipowner (petitioner) at no time repudiated the contract sued on * * *." (p. 23 P. B.)
2. "* * *. It (petitioner) made no suggestion that the contract or any of its terms, were illegal or unenforceable, and at no time did it repudiate the arbitration clause of the contract * * *." (p. 23 P. B.)
3. "* * *. The reason that the *Wilja* did not carry out its contract with respondents was simply because the intervention of winter and the consequent closing of St. Lawrence River navigation made performance of the contract impossible, despite petitioner's honest endeavor to comply with its legal obligations." (p. 26 P. B.)
4. "* * *; that the shipowner (petitioner) declined to agree to make an entirely different voyage from New York to the Continent; * * *." (p. 22 P. B.)
5. "* * * that on November 20, 1939, the *Wilja*, in accordance with directions of the charterer, left New York, where she happened at that time to be, and proceeded towards Montreal in ample time to make her cancelling date of November 28th; that after departing from New York, owing to an accident to her machinery, she was compelled to put back to New York for repairs; * * *." (top p. 22; also see p. 3, p. 25 P. B.)

In the affidavit of its counsel submitted upon the motions petitioner stated (Herbert M. Statt, 105):

> "* * *It thus appears that the charter party is not a contract at all and that it is at most an illusory contract which will not be binding upon the parties. * * *"

(106)

> "* * * Libellants, therefore, are in the position of suing upon a contract which does not exist."

In the letter of December 15, 1939, delivered to respondents proctors *prior to the commencement of the within action* petitioner's proctors stated that *performance under the charter party had become impossible* and terminated the contract, and suggested that respondents institute action immediately (Exhibit "C" annexed to this brief; C. C. A. Op. p. 146).

The common object or purpose of the charter party was to transport respondents' cargo to Antwerp and/or Rotterdam upon the payment of a certain freight therein specified. This object or purpose was not frustrated or rendered impossible, since respondents were agreeable to load their cargo at New York, where the *Wilja* then was located, and which would save to petitioner the expense of proceeding light to Montreal.

Petitioner's refusal to load at New York (or any other U. S. Atlantic port), combined with its contracting with others to carry cargo from New York (to the identical ports of destination provided for in respondents' charter) at a freight about $68,800 more than provided for in the amended charter, clearly refutes petitioner's claim that it made an honest endeavor to comply with its legal obligations.

As was stated in *Scrutton on Charter Parties and Bills of Lading*, Thirteenth Edition, 1931, page 117:

> "* * *. The phrase, especially in its commoner and fuller form, 'frustration of the commercial purpose of the adventure', is perhaps a little unfortunate. A slight variation, in phrase or thought, makes it 'the common purpose', and this suggests that the event, which has happened, or has failed to happen, must

> defeat *both* the respective objects for which the *two* parties made the contract, or must destroy the benefits which *both* respectively were to secure under it. But this can happen rarely, if ever: in most cases the object of one party—to receive payment for goods sold, or for services rendered, or the like—is fully capable of fulfillment."

The Circuit Court of Appeals has found (C. C. A. Op. p. 146):

> "* * *. The record indicates that there was a repudiation of the amended charterparty by the respondent (petitioner) which was evidently doing everything it could to get higher freight rates on a rising market. * * *"

That the petitioner agreed to cause the *Wilja* to sail forthwith from the port of New York upon its release from attachment on November 18th is not only supported by respondents' allegation in the libel (71, 72), but is confirmed by petitioner's proctors letter dated *November 17,* (Exhibit "D" annexed to this brief).

Although the captain of the *Wilja* was called by petitioner and testified (Vol. II, 106-108), and although ample opportunity was granted to petitioner to answer the affidavits submitted by respondents and contained in the Record (pp. 41-54; pp. 56-76; pp. 81-84) no testimony was adduced nor affidavits submitted to show either that the *Wilja* sustained an accident to her machinery or that she was compelled to put back to New York for repairs.

Petitioner's arguments, which are based upon its incorrect, unsupported and contradicted statement of "facts" are unreliable and without merit.

"A"

Answering Petitioner's Point I.

In *Fairgrieve, et al.* v. *Marine Ins. Co. of London*, C. C. A. 8, 94 Fed. 686, certiorari denied, 186 U. S. 484, the court held (687):

> "* * *. It is the settled law of this country that our admiralty courts have jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature, and the ship or party to be charged is within the jurisdiction of the court. It is a jurisdiction the court may decline to exercise where, for some special reason, it appears to be inexpedient to exercise it, but there is no fact disclosed by this record that would justify the district court in declining to take jurisdiction of this case. 2 Pars. Mar. Law, 543; *Taylor* v. *Carryl*, 20 How. 611; *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860; *Enos* v. *Sowle*, 2 Hawaii, 332; *Warren* v. *The Benjamin Rush*, *Id.* 478."

It is respectfully submitted that this is still the well settled law.

The cases relied upon by the District Court in declining jurisdiction and which are referred to and cited by petitioner (pp. 9-13 P. B.) are clearly distinguishable from the case at bar.

Canada Malting Co., Ltd. v. *Paterson Steamships, Ltd.*, 285 U. S. 413, involved an action between four *Canadian corporations* arising out of a collision between two *Canadian vessels* for loss of cargo loaded at a *Canadian port* under a bill of lading providing for delivery of the cargo at another *Canadian port*. The officers and crew of each vessel, being material witnesses, were citizens and resi-

dents of *Canada* and so would not be available for compulsory attendance in the United States District Court. Respondent in said action had, prior to the institution of the suit in the United States District Court, instituted a proceeding in the Admiralty Court of *Canada* for the judicial determination of its liability as between the colliding vessels.

This Court, affirming the District Court's order declining jurisdiction, stated (285 U. S. 413, at 424):

> "* * *. The District Court embodied in the decrees an order that the respondent should appear and file security in any action which might be instituted by the petitioners in the admiralty courts of Canada, so that petitioners would not by dismissal of the libels lose the security gained by the foreign attachment."

In *Malcomess & Co., Ltd.* v. *S/S New Texas and Elder Dempster & Co., Ltd.*, 1926 A. M. C. 1514, the action was brought by a *British subject against a British vessel* for damage to cargo loaded on said vessel while being transported on a voyage from Canada to South Africa, *all* of the *witnesses being located in Canada.*

In *United States Merchants' & Shippers' Ins. Co.* v. *A/S Den Norske Afrika Og Australie Line*, 1 Fed. Supp. 934, affirmed 65 Fed. (2) 392, the respondent, a Norwegian corporation, was the owner of the S/S "Tricolor" which, together with her entire cargo, became a total loss near Colombo, Ceylon, due to a fire on board followed by explosions.

The S/S "Tricolor" had loaded various shipments of general cargo totalling 8,000 tons at *8 European ports.* The libellant insured but *one small* shipment for a Dutch national.

The bill of lading, issued in Hamburg, Germany, contained a clause stipulating that all questions arising under the bill of lading were to be governed by the law of Norway and were to be decided in Oslo. *All of the trans-*

actions occurred in foreign territory where all of the evidence had to be gathered. The District Court stated (top 935):

> "The supporting affidavits of the respondent indicate * * *; that the defense will be that no negligence occurred in the stowage of the cargo or otherwise, and this will involve investigation of facts and examination of witnesses, *all* of whom are remote from this jurisdiction. * * *. The unavailability of the witnesses and the hardship to the respondent of being compelled to litigate here and in disregard of the bill of lading agreement are urged as reasons for declining jurisdiction."

The only question raised before the Circuit Court of Appeals (65 F. [2] 392) was whether the libellant, an American insurance company suing as subrogee for a Dutch shipper, for loss of *one small* shipment, was entitled as a matter of right to have the court retain jurisdiction. The Circuit Court of Appeals stated (392):

> "(1) Both sides concede that had the Dutch shipper itself moved in the suit, jurisdiction would have depended upon the discretion of the court; each party would have been an alien, and the District Court is not obliged to try such cases; *its jurisdiction depends upon whether its exercise is essential to justice; whether the libellant is driven to seek it in order to secure any adequate redress at all. Canada Malting Co.* v. *Paterson S. S.*, 285 U. S. 413, 52 S. Ct. 413, 76 L. Ed. 837; *Charter Shipping Co.* v. *Bowring*, 281 U. S. 515, 50 S. Ct. 400, 74 L. Ed. 1008; *The Belgenland*, 114 U. S. 355, 5 S. Ct. 860, 29 L. Ed. 152."

In *Goldman* v. *Furness, Withy & Co.* (D. C.), 101 Fed. 467, the libellant was suing under a colorable assignment from a certain person with respect to whom, only four days before in a similar action based on the same facts,

the District Court had rendered its decision declining jurisdiction. Upon the former libel filed by libellant's assignor, defendant *appeared specially* and filed affidavits showing that *no part of the contract was to be executed within the United States*, that the contract sued upon had been *partially performed*, that it was governed by the law of Canada, that *nearly, if not quite, all of the witnesses were in Canada and that the convenience of the parties would be greatly subserved by the trial of the cause in Canada rather than within this jurisdiction.* The United States Court was at that time over-burdened with domestic cases.

In *The Lady Drake*, 1 Fed. Supp. 317 (pp. 12, and 15, 16, P. B.) as will appear from the headnote:

> "All the real parties concerned except consignee's underwriters were Canadian concerns, and all witnesses were either in British West Indies, in Canada or on vessels trading between the British West Indies and New Brunswick, Canada, and vessel did not come to New York, and it appeared that it would be more convenient if case were tried in Canada than in United States."

In the case at bar, however:

1. *The parties have no common home forum,* being nationals of *different* countries.
2. *Practically all of the witnesses and evidence necessary for the trial of the within action are available at New York and are not readily available elsewhere* (189-196; 215-216; 218-228; 174; 176; 50; C. C. A. Op. p. 147).
3. *The widespread conflict and chaotic conditions in Europe render it impracticable, if not impossible, to try the issues herein in London or elsewhere in Europe.*

4. Petitioner herein itself invoked the jurisdiction of the District Court to dismiss the complaint on the merits.
5. Today, Federal Courts are not crowded by an excess of litigation.
6. Petitioner repudiated its contract and no cargo was ever loaded or carried on petitioner's steamship from any port.
7. *Justice requires that jurisdiction be retained.* If jurisdiction is finally declined the result, for all practical purposes, will be the same as if the within action had been dismissed on the merits, and that without any trial.

In *Cuba Railroad Co.* v. *Crosby*, 222 U. S. 473, 56 L. Ed. 274 (p. 13 P. B.), *the jurisdiction of the court was in no way involved.* The decision of this Court in that case was merely authority for the proposition, as will appear from the headnote, that:

> "The Federal courts cannot assume without proof that, under the law of Cuba, like that of the forum, a promise to repair or replace defective machinery, when notified by an employee of the defect, throws upon the master the risk of injury to such employee from such defect until the time for performance has expired, or that it does away with or leaves to the jury what otherwise would be negligence as a matter of law."

In that case plaintiff argued that it should not be compelled to prove the law of Cuba in order to prove his case. In denying the plaintiff's said contention this Court made the remarks quoted by petitioner.

"B"

Answering Petitioner's Point II.

The Circuit Court of Appeals *did not substitute* its discretion for that of the District Court but reversed for clear error of law and remanded the cause to the District Court (C. C. A. Op. p. 147).

Petitioner's arguments under Point II (p. 13 P. B.) are therefore inapplicable and are misdirected.

Petitioner, in quoting from the case of *Charter Shipping Co.* v. *Bowring, Jones & Tidy,* 281 U. S. 515, pp. 518-519 (p. 13 P. B.), has omitted from its quotation material parts of the decision which are hereinbelow italicized:

> "*Both the parties being British subjects, and the present litigation as well as the suit pending abroad, apparently involving the application of English law to the fund located there,* it was for the district court to say, as it did, upon a consideration of all the circumstances, whether it should decline 'to take cognizance of the case if justice would be done as well by remitting the parties to the home forum.'
>
> * * *. *While some witnesses as to seaworthiness were 'American repair men,' it does not appear that any were in or near the southern district of New York. The libel alleges that the Charterhague plied as a common carrier between American ports and London, where, so far as appears, her officers and crew would be available as witnesses as to the alleged unseaworthy condition of engines and boilers.* It was for the District Judge to consider the facts appearing and the inferences which he might draw from them, and reach his own conclusion as to the convenience of witnesses, as well as the other factors

upon which he decided that justice would be best served by leaving the parties to their suit in England."

It is obvious why petitioner omitted the parts which it did, even going to the extent of quoting a portion of a sentence.

It is further obvious that this Court predicated its said decision upon the facts of the said case, which are clearly distinguishable from those in the case at bar.

The case of *Pietraroia* v. *N. J. & H. R. R. & F. Co.*, 197 N. Y. 434, is authority for the principle that:

> "The powers of review of the Appellate Division comprehend the right to review an exercise of discretion by the inferior courts, and, equally, the right to exercise its own discretion, independently, when the facts or circumstances of the case are such as to justify it" (see headnote, 434).

"C"

Answering Petitioner's Point III.

Under its Point III (pp. 14-17 P. B.) petitioner argues the converse of respondents' Point III herein.

That the contract of charter involved herein was made for the account of the New York office of the respondents (187) is not and cannot be denied by petitioner.

Both the charters, Exhibit A and, as amended, Exhibit B, were signed "by authority of Charterers" who are specifically designated as "Louis Dreyfus & Co., of New York."

Petitioner has singularly omitted to call to the Court's attention the following provision on Exhibit A (R. p. 28, line 12), reading as follows:

> "Orders as to loading port to be given *on receipt of Master's application to 'SESOSTRIS-NEW YORK'* * * *" (Sesostris-New York being the cable address of respondents' New York office).

The words hereinabove italicized appear in the said charter in *handwriting and in ink*, and supercede both the printed and the typewritten portions of the contract.

While on the motions petitioner failed to answer or deny respondents' affidavits wherein it was shown:

> "Almost all of the evidence required to try the within action is available at New York, and is not readily available elsewhere (189-196; 215-216; 218-228; 174; 176)."

petitioner attempts to argue that it will require certain testimony of its ship's officers (p. 16 P. B.).

The ship's officers were at New York; in fact, the captain testified (Vol. II, p. 106-108), yet not one iota of testimony was adduced by petitioner as to the seaworthiness of the *Wilja*, whether due diligence had been exercised, or the reason why the *Wilja* had returned to New York, nor was the slightest testimony or evidence of any breakdown at sea elicited.

Upon the argument of the motions on both December 20th (333, 334) and December 28th (371, 372), and while the *Wilja's* crew was still at New York, the District Court suggested that petitioner take their testimony, which petitioner has failed to do, stating (334):

> "Mr. Statt: I do not want to incur expense."

The testimony of shipyard employees at New York, as well as respondents' experts, concerning the conditions found upon the return of the *Wilja* to New York (November 21) is more controlling and significant, and more truly indicative of the condition of the *Wilja* when it sailed on November 20th (C. C. A. Op. p. 147) than the

testimony of owner's representatives, surveyors or shipyard people in Gothenburg, as claimed by petitioner (bot. p. 16 P. B.).

In the affidavit submitted by proctor for petitioner (R. P. 34) cited by it, petitioner merely said that it *may* be necessary to take certain testimony. He did not make the statement (p. 16 P. B.) for which the reference is cited.

On the motions petitioner failed to deny respondents' allegation (Libel; 70) that petitioner would cause the *Wilja* to sail and proceed forthwith from the port of New York to St. Lawrence loading ports immediately upon release from attachment. Petitioner now attempts to assert (p. 17 P. B.) that it is of the "utmost importance" for it to obtain testimony in London with respect thereto.

Proctors for petitioner *know* that the respondents' allegation is correct, for they themselves have confirmed it in *their* letter to libellants' proctors dated *November 17*, 1939, wherein they state (Exhibit "D" annexed to this brief):

> "Confirming our advices by telephone this afternoon, Messrs. J. H. Winchester advise us that they are in receipt of a cable from owners reading as follows:
>
> 'AGREED WITH DREYFUS WHO RELEASING *SEND WILJA IMMEDIATELY* ST LAWRENCE AGENTS MONTREAL SHIPPING COMPANY'
>
> * * * * *
>
> Messrs. Winchester advise us that the vessel cannot sail tonight but they have requested us to do all we can to enable her to proceed at about *10 a.m. tomorrow.* Accordingly, we should have everything ready tonight so that arrangements can be made to release the vessel the first thing tomorrow morning."

"D"

Answering Petitioner's Point IV.

It was only *after* the District Court, in reliance upon an oral "statement" that petitioner would appear in an arbitration proceeding in London (Op. Vol. II, 378), had declined jurisdiction, upon the authority of *Canada Malting Co., Ltd.* v. *Paterson Steamships, Ltd., supra,* and had relegated the parties to arbitration in London (Op. 235) that respondents moved for reargument (237).

Upon said motion respondents requested that the Court condition its declination of jurisdiction by requiring the petitioner to appear and file security in the arbitration to which the parties had been relegated by the Court, or, in the alternative, to retain jurisdiction but stay the within action pending the hearing and determination of the arbitration in London (237-239).

Petitioner opposed the motion for reargument, and the District Court denied the motion.

Petitioner's suggestion (p. 18 P. B.) that respondents might effectively proceed alone with arbitration in London, in the event petitioner refuses to join and obtain a binding judgment with respondents' nominee acting as sole arbitrator, is contrary to the authority of *Hirji Mulji, supra.*

Any award obtained by respondents would be sterile, and the entire arbitration proceeding a hollow mockery, unless the security heretofore obtained by the foreign attachment is retained by respondents. Petitioner's refusal to furnish such security demonstrates its lack of a sincere desire to abide by and *pay* any award of arbitrators.

Even in *Canada Malting Co., Ltd., supra,* the offer on the part of respondent to furnish security in Canada was made in writing, under oath, and submitted to and filed

in the District Court. That this offer was a compelling factor in the Court's determination to decline jurisdiction is obvious from its decison and order, whereby the Court conditioned its declination by requiring respondent to appear and furnish security in Canada.

Even in *A/S Inger* vs. *Steamship Kanto Maru,* 1939 A. M. C. 1229, 1230, affirmed *1940 A. M. C. 1124,* C. C. A. 9th, wherein the Circuit Court found (bot. p. 1125):

> "Some of the pertinent matters shown by the affidavits which were considered by the court in the exercise of its discretion appear in its opinion. It appears therefrom that a *collision* occurred in the territorial waters of *Japan*; that navigation therein is controlled by the law of *Japan*; that the pilots in charge of the boats were *Japanese* pilots; that the libel in the *Japanese* admiralty court was promptly brought and was being diligently prosecuted; that both ships were foreign owned; that there was *no American cargo* aboard; that no *American insurance* company was involved in the loss; that there were *witnesses available in Japan* other than those on the two colliding ships; that although no cross libel had been filed by libellant in the proceeding pending in the Japanese Admiralty Court, consent was given by respondent to the filing of such a cross libel in that court."

the order declining jurisdiction was conditioned *not only by requiring the respondent to appear and furnish security for value in the Japanese action, but also by requiring respondent to furnish satisfactory assurances that any decree of the Japanese court would be satisfied by the payment of funds to libellant in Norway in Norwegian money.*

The conditions required by the District Court in its order went far beyond any legal right the libellant may

have had in Japan and far beyond any voluntary offer made by respondent.

It would therefore appear that in the within action the District Court was in error when it held (Op. 257):

> "* * *. There seems to be no authority for an order requiring the bond. * * *"

"E"

Answering Petitioner's Point V.

The Circuit Court of Appeals had a thorough conception of the decision of the District Court, as it indeed had of the entire record of the case, as will appear from its opinion.

The District Court's decision to relegate the parties to arbitration in London was a material part of its entire decision, and was the condition or basis upon which it arrived at the decision to decline jurisdiction, as will appear from the Court's decision above referred to (Vol. II, Op. 378).

The District Court not only declined jurisdiction but relegated the parties to arbitration in London (Op. 235).

Since petitioner by its motions had sought an order to dismiss the libel on the alleged ground that the libel failed to state a cause of action (90, 91) it became necessary to state in the final decree which of petitioner's motions had been granted, and to show that the dismissal was not on the merits.

"F"

Answering Petitioner's Point VI.

We have shown (pp. 28-30, this brief) that many of the facts upon which petitioner has based its arguments in its Point VI (pp. 22, 23, 25 and 26 P. B.) are incorrect, are unsupported by the Record, or are contradicted by the Record.

Petitioner likewise confuses the issues.

The damages sustained by respondents were caused by petitioner's repudiation of and refusal to enter upon the performance of its Charter of August 17th, and as amended November 18th.

That petitioner failed to tender the Wilja for loading is admitted. Petitioner seeks to excuse this failure upon various grounds including a claim (a) that it was not required to do so because there was no valid contract between the parties and that respondents were in the position of suing upon a contract that did not exist (106), and (b) that even if there had been a valid contract its performance was frustrated and rendered impossible and such contract had been terminated (Exhibit "C" this brief).

Petitioner's termination and repudiation of the contract raises the issue as to whether the charter party was a valid subsisting contract at the time when petitioner declared it to be terminated and *which issue may only be determined by the Court.* As was stated in *Hirji Mulji* (*supra*):

> "That a person before whom a complaint is brought cannot invest himself with arbitral jurisdiction to decide it is plain. His authority depends on the existence of some submission to him by the parties of the subject matter of the complaint. For this

> purpose a contract that has determined is in the same position as one that has never been concluded at all. It founds no jurisdiction."

The effect of the decision in the *Hirji Mulji* case, as was stated by the Harvard Law Review,

> "* * * is to deprive the arbitrator of effective jurisdiction of all disputes involving a question of impossibility, for if the arbitrator finds that there is no excuse, the losing party can always defend in an action on the award on the ground of lack of jurisdiction to make the award, and thus secure another trial on the very question in dispute." 40 Harv. L. Rev. 305.

The libel was filed *after* petitioner's repudiation and termination of the contract (C. C. A. Op. p. 146; Exhibit "C," this brief) and any attempted suggestion or inference to the contrary (p. 25 P. B.) is incorrect.

We have heretofore discussed *The Atlanten, supra,* cited by petitioner (pp. 24, 25, 27, 28 P. B.) and *The Soloy, supra,* cited by petitioner (pp. 27, 31).

In *Shanferoke Coal & Supply Corp.* v. *Westchester S. Corp.*, 70 F. (2d) 297 (C. C. A. 2), cited by petitioner (p. 27 P. B.), the Court considered and took into account the principles laid down in *Jureidini (supra)* and *The Atlanten (supra).* It was unnecessary to apply those principles to the facts of that case, as the opinion clearly shows.

The suggestion by respondent (p. 27 P. B.) that had *The Atlanten* case arisen subsequent to the enactment of the arbitration statute the decision might have been otherwise, is unsupported by the decision of *In Re Utility Oil Corporation, supra,* where a dispute arose after the shipowner had partially performed and while the shipowner was trying to continue performance of the contract.

Petitioner's repudiation and revocation of the contract and its denial under oath to the District Court of its existence, validity or enforceability (Statt, 105, 106) denies to petitioner any right to demand or obtain the benefit of the U. S. Arbitration Act or of the arbitration clause of the contract.

The cases of *A. Sanderson & Son* v. *Armour & Co., Ltd.*, 1922 Scotch Cases (House of Lords) 117; *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co., Ltd.* (1923), A. C. 480; *Macaura* v. *Northern Assurance Co., Ltd.* (1925), A. C. 619; *Tamplin (F. A.) Steamship Company, Limited* v. *Anglo-Mexican Petroleum Products Company, Limited* (1916), 2 A. C. 397, cited by petitioner (pp. 28, 31 P. B.), were considered and distinguished by the Court in the case of *Hirji Mulji, supra.*

In none of the said cases was there a repudiation of the contract *in toto* as in *Jureidini, supra,* nor was there a denial of the existence of a valid contract. There was merely a denial of liability under the contract. The same distinctions are true of the cases of *Woodall* v. *Pearl Assurance Co., Ltd.* (1919), 1 K. B. 593, and *Golding* v. *London and Edinburgh Insurance Co., Ltd.* (1932), 43 Ll. L. Rep. 487, cited by petitioner on page 29 P. B.

The within is not a case where the respondents have merely alleged a repudiation of the contract by petitioner, but where the whole record clearly shows not one but a number of repudiations by petitioner of its contracts, as the Circuit Court has found (C. C. A. Op. p. 146) and the petitioner itself has denied the existence of the contract (106).

Petitioner's doubt (p. 30 P. B.) as to whether the House of Lords correctly decided the case of *Hirji Mulji* is as amusing as its attempted distinction of the principle of law expressed in the said case.

The question before the Court in the *Hirji Mulji* is not, as suggested by petitioner (top. p. 30 P. B.) but as stated in the said case, as follows (p. 502):

> "As the arbitrator was the judge, if at all, both of law and fact, the sole question is whether he had any jurisdiction to decide, as he purported to do, between the parties. This depends on the question whether or not there was any submission, and that again on the question whether, at the time when it purported to be submitted to him, there was a dispute, subsisting *between the parties, 'under this charter,' that is, a contract then subsisting.*"

It is respectfully submitted that the decision by the House of Lords in *Hirji Mulji* represents the clear British law on this subject.

CONCLUSION.

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HENRY E. OTTO,
Counsel for Respondents.

SAMUEL C. OTTO,
of Counsel.

Exhibit C.

HAIGHT, GRIFFIN, DEMING & GARDNER

CABLE ADDRESS
MOTOR NEW YORK

JOHN W. GRIFFIN
HAROLD R. DEMING
KENNETH GARDNER
HENRY M. HEWITT
WHARTON POOR
STANLEY W. SCHAEFER
DONALD HAVENS
EDGAR R. KRAETZER
CHARLES S. HAIGHT JR.
HERBERT M. STATT
FRANK J. FOLEY

80 BROAD STREET
NEW YORK December 15, 1939

Messrs. Otto & Easterday
2 Broadway
New York

s/s VILJA-C/P AUGUST 17, 1939
Our file 163-46

Dear Sirs:

In response to your inquiry, we are instructed by owner to inform you that as United States ports are not within the range of the above dated charter party, owner declines to permit the vessel to load at New York or other U. S. Atlantic port.

It seems to us that inasmuch as Montreal, the port to which the vessel was originally ordered and to which she proceeded, is now closed, performance under the above dated charter party has become impossible and that, accordingly, it should be agreed upon between both parties that the charter party is terminated.

Under all the circumstances, therefore, we cannot imagine any reasonable theory upon which vessel and owner can be held liable for her inability to load under the above dated charter. If, however, your client nevertheless insists upon bringing suit, we suggest that it would

be highly advisable to institute action immediately so that owner and we may have time to make necessary arrangements and possibly avoid loss of time and other damage to vessel and owner.

Yours very truly,
HAIGHT, GRIFFIN, DEMING & GARDNER
By Herbert M. Statt
Herbert M. Statt

HAIGHT, GRIFFIN, DEMING & GARDNER

CABLE ADDRESS
MOTOR NEW YORK

JOHN W GRIFFIN
HAROLD S DEMING
KENNETH GARDNER
HENRY M HEWITT
WHARTON POOR
STANLEY W SCHAEFER
DONALD HAVENS
EDGAR R KRAETZER
CHARLES S HAIGHT JR
HERBERT M STATT
FRANK J FOLEY

80 BROAD STREET
NEW YORK

Exhibit D.

November 17, 1939

Messrs. Otto & Easterday
2 Broadway
New York

s/s "ILJA-CHARTER PARTY
DATED LONDON, AUG.17,1939

Dear Sirs:

Confirming our advices by telephone this afternoon, Messrs. J. H. Winchester advise us that they are in receipt of a cable from owners reading as follows:

"AGREED WITH DREYFUS WHO RELEASING SEND "ILJA IMMEDIATELY ST LAWRENCE AGENTS MONTREAL SHIPPING COMPANY"

Then follows reference to bunkering at Sydney which we did not copy accurately as it is immaterial to the questions involved. Messrs. Winchester advise us that they are preparing the vessel for sea and have given the master instructions to proceed to the St. Lawrence, so that it is obvious that owners' instructions are being acted upon.

We are informed by the National City Bank, 55 Wall Street Branch, that owners have on deposit at least $60,000. We have proposed to you that pending confirmation from your client that the libel is to be discontinued and the attachment released, you take the National City Bank's undertaking to substitute the cash security of $60,000 for your attachment on the vessel. We enclose herewith copy of letter which we have suggested National City Bank give you. Mr. Connors, who is in charge of the matter, advises that he is not yet prepared to state whether the Bank will issue such a letter but has promised to inform us by 4.30 p.m.

Messes. Winchester advise us that the vessel cannot sail tonight but they have requested us to do all we can to enable her to proceed at about 10 a.m. tomorrow. Accordingly, we should have everything ready tonight so that arrangements can be made to release the vessel the first thing tomorrow morning. Yours very truly,

HAIGHT, GRIFFIN, DEMING & GARDNER